

A CODE OF MUSLIM PERSONAL LAW

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A CODE OF MUSLIM PERSONAL LAW

VOLUME II

Containing laws of

Gift, Waqf, Will and Inheritance
Codified and Re-stated in the light of the Holy Qur'ān, Sunnah
and authentic books of *fiqh*

By

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P R E F A C E

It is a matter of great satisfaction for me that, by the Grace of Allah, I am able to present this second volume of "A Code of Muslim Personal Law" to the legal fraternity of the Muslim 'Ummah, in the fulfilment of my promise given out in the preface to the first volume of the Code which was published at the occasion of the inauguration of the First Asian Islamic Conference held at Karachi in July 1978. It is, again, a fortunate incident that this second volume is being published at the advent of celebrations for the fifteenth century of *Hijra*—a new era of hopes for inaugurating a true Islamic system of life, not only of inaugurating but of working it successfully with a firm determination of giving a practical demonstration of the potentialities of Islam for peace and progress of humanity.

2. The present volume contains the Laws of Gift, *Waqf*, Will and Inheritance, discussed elaborately in the light of the Qur'ān, *Hadith* and the standard books of all the recognized schools of *fiqh*.

3. To illustrate the current application of these laws, the rulings of the superior courts of Indo-Pakistan sub-continent have also been cited on various aspects. This is in addition to numerous quotations from modern legislation in Arab countries, particularly with regard to statutory control of *Waqf*, Will and Inheritance. This effort, I hope, will prove useful to the legal fraternity of all the Muslim countries, particularly Pakistan, at this juncture.

4. I have attempted to deduce the provisions of these laws, in many cases, directly from the holy Qur'ān, *Hadith*, and *Athār* of the Companions of the holy Prophet, and have also drawn, at places, my own conclusions which, in some cases, may not be in strict conformity with the rules of a

particular school of *fiqh*. This approach, I believe, may develop ultimately into a new trend in the current history of Islamic Law. In fact, I was impressed by the current approach in modern legislation in various Arab countries where, by application of the process of *talfiq*, and *tarjih* the *taḥyīr* (option) was exercised in favour of general convenience and welfare of the 'Ummah. The best example of this process may be found in the Egyptian law of Administration of *Waqf* Properties of 1946, wherein the provisions of law have been derived from all the four sunni schools of *fiqh* and by exercising *Ijtihād*.

5. By citing this example, I mean that in the process of re-interpretation of the provisions of the holy Qur'ān and the *Sunnah* and employing *Ijtihād* in the application of the *Sharī'ah* in the modern world, the Muslim law should be broad-based and the provisions of all the accepted schools of *fiqh* be taken into consideration for the purpose of re-statement and codification of Muslim law, and the balance be held in favour of the one which is more akin to the basic norms of Islam and the genius of the people, so as to meet and answer the challenges of the time. The process so applied will play a magnificent role not only in contributing directly to the intellectual rationale of Islam but also bring an immense uniformity among the different sects of the 'Ummah, which should nevertheless be our ultimate aim.

6. My efforts, such as they are, have been to re-state the formulation of the provisions of Muslim Law on the same old well-understood foundations of the Qur'ān and *Ḥadith* recognised as such by our learned Jurists from the early formation of *fiqh* onwards. During my search I have always found that the principles of Islamic Jurisprudence are capable of solving all difficulties and handling all situations that might arise in their application in a complex developing society such as ours. I have, in a separate book, suggested the necessary changes that might bring a number of the current legislative enactments of Pakistan within the four corners of the same principles. And I venture to state that the two volumes of this work of mine may be of some help to the legislators, the lawyers and the judge alike.

7. Let me now once again thank my esteemed friend, Mr. Mehdi Ali Siddiqi, (Rtd. Additional District and Sessions Judge), Editor, "Universal Message", Karachi for his reading the manuscript and making valuable suggestions. I am also thankful to my daughter Miss Dur-i-Shahwār for helping me in checking the press-proofs and preparing the errata and index of the book.

Karachi-33,
5th March, 1980.

DR. TANZIL-UR-RAHMAN

TRIBUTES



"We have assembled here to launch* a magnificent book entitled "A Code of Muslim Personal Law" written by Dr. Tanzil-ur-Rehman, an eminent scholar of Islamic Law. The book runs into about 770 pages but is all the same the first volume of the treatise on the subject of *Muslim Personal Law* and embraces a statement of the law in a codified form relating to Marriage, Dower, Maintenance, Divorce, Dissolution of Marriage, *Khul'a Mubarat*, *Iddat*, Parentage, Legitimacy and Custody of Children, etc. The second volume according to the undertaking given by the learned Author in his Preface, will contain statement of the law relating to Gift, *Waqf*, Will and Inheritance. Upto now, by and large, the books that have appeared on the subject of Muslim Personal Law have dealt with that subject as though it covered the same ground as the Anglo-Mohammaden Law—that is, the law that was applied by the pre-partition British Indian Courts of the Sub-continent to settle issues relating to Muslim Personal Law. Now of course, there is no such limitation on the power of the courts and the courts in Pakistan are fully entitled to settle these issues in the light of Holy Qur'ân, Sunnah and authentic books of Fiqh. After the establishment of Pakistan the institutes of Anglo-Mohammaden Law have been replaced by the Muslim laws *stricto-senso* and Dr. Tanzil-ur-Rehman who draws on the rules of conduct of nearly all the recognised schools of thought in

*This speech was delivered by Mr. A. K. Brohi, as chief guest, at the book-launching ceremony held at Hotel Inter-continental, Rawalpindi on 30th January, 1979. It was attended by Supreme Court Judges, Secretary, Ministry of Law, Chairman and members of the Council of Islamic Ideology, President and members of Rawalpindi Bar Association, scholars of the Islamic Research Institute and a galaxy of Rawalpindi/Islamabad.

Islam like the *Hanafi*, *Maliki*, *Shafi'i*, *Hanbali*, *Zahiri* and *Shi'a*, etc. presents to us a clear-cut, systematic and methodical exposition of the views of the great jurists on diverse aspects of Muslim Personal Law as also the way those very matters were being looked at by the courts of law in the pre-partition times. In the context of present developments which have taken place in the sphere of application of Muslim Personal Law for the determination of issues that come up before the courts, his book would appear to be practically an invaluable asset both for the members of the Bar and the Bench, as there is an extended discussion on various topics of Muslim Personal Law with copious cross-references to the original sources.

Quite at the very commencement of the book there is a list of the reference books which have been consulted by Dr. Tanzil-ur-Rehman in order to be able to present a comprehensive survey of the legal problems that he has discussed. A bare glance at the books mentioned in this list will show the range of his scholarship and the magnitude of the legal erudition that has gone in the writing of the present book. The need for such a book as the one presented by Dr. Tanzil-ur-Rehman in the form of codified propositions that analytically set-forth elements of Muslim Personal Law is all the great, now that Shariah has become justiciable in the country and our courts would be looking at Islamic Law strictly from the point of view of Islamic injunctions contained in the Holy Qur'ān and the Sunnah of the Holy Prophet.

I hope that the second volume of this magnificent treatise of Islamic law would soon be made available to the Bar and the Bench as also to other scholars of Islamic law so that administration of justice according to Shariah proceeds in this country in the light of all available resources that can throw light on various aspects of the legal problems that arise when Muslim Personal Law is applied to determine the Muslims' rights, obligations, liabilities and duties."

(A. K. BROHI)

Federal Minister for Law and Parliamentary
Affairs, Govt. of Pakistan.

Islamabad,

January 30, 1979.

My dear Dr. Tanzil-ur-Rahman.

Thank you for your letter of the 15th of July 1978, and the valuable set of your books* on various aspects of Muslim law as well as the English-Urdu Law Lexicon. Although I have not had time to do more than to glance at the table of contents so as to have a cursory idea of the manner of presentation of the subjects discussed by you, I can say at once that the books show the amount of labour and pains you have put into them. I am sure that they would prove very useful not only to the members of the Bench and the Bar, but also to the members of the public at large who wish to be informed on various aspects of Muslim law. At this juncture when the nation seems to be serious about the introduction of the Islamic laws and the Islamic way of life, you have done a real service by producing these excellent books.

May I express the hope that you will continue with such useful work.

With kind regards.

Your Sincerely,

Rawalpindi,
July 26, 1978.

(S. ANWARUL HAQ)
Chief Justice of Pakistan.

Dr. Tanzilur Rahman's first volume of "A Code of Muslim Personal Law" is clear and concise, comprehensive and complete as regards the topics covered therein. The book meets the long demand for a scholarly and systematic treatise on Muslim personal law of Marriage, Dissolution of marriage, Dower, Maintenance of wife and children and other related subject. The authentic and absorbing work will prove useful to the scholars and students, jurists and judges. It is hoped that the future volumes will maintain the same standard.

Karachi,
27th February, 1980

(SYED SHARIFUDDIN PIRZADA)
Federal Minister for Law & Parliamentary Affairs and Attorney General of Pakistan.

*The books here refer to the author's "A Code of Muslim Personal Law" (Vol. I) and "Majmu'ah Qawanin-i-Islam" (Vols. I to IV) and *Islam ka Nizam-i-Adalat*.

"The first Volume of the compendious Code of Muslim Personal Law planned by Dr. Tanzil-ur-Rehman, deals with Family Laws. It furnishes a handsome proof of his scholarship and of his determination to provide, for students and practitioners alike, a comprehensive aid for the implementation of Islamic Law in Pakistan, through the Courts. It is well adapted to the manner of working of our Courts, dealing as it does, with original sources and early scholastic commentaries, as well as judicial authorities from the various regimes that have operated in India and Pakistan, since the advent of Islam in the Sub-continent.

The utility of this work, in the period, now commencing, of establishment of true Islamic Law to govern every aspect of human activity in Pakistan, cannot be over-estimated. And it is impossible to praise Dr. Tanzil-ur-Rehman too highly for the studious application and perspicacity that shine through his work."

Lahore,

17th December, 1978.

(MR. JUSTICE A. R. CORNELIUS),

Retd. Chief Justice of Pakistan.

"Dr. Tanzil-ur-Rehman's first volume of "A Code of Muslim Personal Law" is a mine of information about subjects as Marriage, Divorce, Dissolution of Marriage, Dower, Maintenance of wife, children and other relatives, Parentage and Legitimacy, Custody of children and other related topics. I understand that subjects left over will be dealt with in a subsequent volume. I would look forward to that volume.

Dr. Tanzil-ur-Rahman has already to his credit a five volume compendium in Urdu, on Muslim Personal Law, which he has compiled for the Islamic Research Institute, Islamabad. The learned Author has had illustrious predecessors in this field.....Whereas the works of the author's learned predecessors (barring Amir Ali) were principally oriented towards precedents set by courts in this Sub-continent in British times, Dr. Tanzil-ur-Rahman has based himself primarily on the fundamental "Nusus" — the Holy Qur'an and Sunnah — and has tried to elucidate the matter under discussion in the light of case-law as well as the opinions of acknowledged masters of the various schools of Muslim Jurisprudence including Sunni and Shi'ah scholars.

The usefulness of Dr. Tanzil-ur-Rahman's work has been enhanced by the fact that he has also taken note of recent developments of Muslim Law by legislative enactment in various Muslim countries. He has not hesitated to indicate his own preferences among contending views on any point and though all scholars may not agree with him in his conclusions, the opinions he favours, have been well brought out, with due regard to original sources.

The Author's style is lucid and clear and the commentary comprehensive and well-reasoned. The book is an important contribution to the legal literature on the subject. The learned author has not failed to point out departures from the *Nusus* in some of the recent enactments designed to modernise Islamic law and has made valuable suggestions for improvements. The printing and get-up of the book are excellent. This is a timely and most useful publication at a time when the Islamisation of Laws is very much in the air in Pakistan."

Lahore,

28-11-1978.

(MR. JUSTICE S. A. RAHMAN),

Retd. Chief Justice of Pakistan.

"A Code of Muslim Personal Law" is unique in so many respects; the most outstanding being the quotations from the Holy Qur'an, *Hadith* and other authorities on Islamic jurisprudence, which not only support the propositions formulated by the learned author but also introduce one who is interested in the subject to the rich heritage that has been left for us by illustrious scholars, whose *Taqwa* and *Ijtihad* is indeed enviable. While going through the Code I felt in the company of the great and I am sure that all those who have access to this, whether as students, Jurists or Judges, they shall find the contribution of the author of immense value. Another feature which gives the Code a position of eminence amongst similar efforts is to be found in the fact that the learned author has taken good care of comparing modern trends in legislation and thought in the Islamic countries and has also referred to the recent rulings of the Superior Courts of Pakistan. He has not only given the divergent views of our Masters and reasons therefor but has also quoted the verses of the Holy Qur'an and *Aḥādīth* on which their views are grounded. He has also endeavoured to resolve the conflict wherever it has come to surface and has shown no hesitation in making his own observations which to my mind are not only weighty, but are also entitled to great respect.

It augurs well that the Code has come at a time when the most important legislative measure, truly speaking, a land-mark in the contemporary history of Islam, namely Legislation for the constitution of Shariat Benches has been promulgated. Those who have some doubts about the working of the Shariat Benches should feel satisfied that the country has the talent and learning in many quarters hitherto unknown which can be harnessed for the successful switch-over from the British inspired Statute Law to the revealed law as contained in the Holy Qur'an and Sunnah, which incidentally happens to be *sine qua non* for the transformation of the whole system and thus enable the Muslims of this country as also those living under Muslim States to order their lives in accordance with Qur'an and Sunnah."

Peshawar,

27th December, 1978

(MR. JUSTICE ABDUL HAKEEM KHAN),

Chief Justice, Peshawar High Court.

"The study of Muslim personal law is an important core of Islamic studies. Since the end of the Second World War many Muslim countries have attained independence and have been trying to tackle the problems of legislation, for which they have to take into consideration the entire literature on *fiqh*. The learned author has done a great service in presenting it in a codified form. In the author's words 'The work is based on the holy Qur'an and Sunnah and the original Arabic text-books of acknowledged authority. It gives copious references so that a searching reader may be in a position to go direct to the original sources without much inconvenience and find for himself the details of the relevant law on the subject, if needed.'

The learned author has drawn on all recognised schools of law in Islam and has also cited the current laws that are enforced in Muslim countries. He also has a bibliography and an index. The utility of the book would have increased had he added an index of the cases, at least of the important ones which have a bearing on the modern problems. There is no denying the fact that there has set in a process of interpretation of laws and in some cases legislation is initiated in order to make Islamic law attuned to contemporary situation. Muslims live all the world over and it is time that they establish an International Institution of *Ijtihad* which should draw representatives having insight into the spirit of modern times from various countries as well as from all important schools of law. If nothing else, such a body could exercise great influence on the modern legal thinking and acquire an authenticity that will give it a position of acknowledged leadership in the field of *Ijtihad*. Whether such an institution comes into being through an agreement or it grows and acquires consensus of the Muslims all the world over is not important at the moment. The author's effort, though based on his individual work, makes it all the more important because no such comprehensive compendia, to the best of the present reviewer's knowledge, is available which gives information regarding not only classical authorities on *fiqh* of different schools but also brings within the focus of the legislative measures undertaken in various Muslim countries matters that are of contemporary relevance.

The author must be congratulated for his good work. It is hoped that he may revise the book with care to improve upon certain phrases and expressions and avoid printer's devil".

Islamic Culture, Hyderabad Deccan, India, (October, 1979).

A CODE OF MUSLIM PERSONAL LAW

VOLUME II

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CHAPTER—XXVI

Law of Gift (Hiba)

Section 183. Transfer of movable or immovable property with immediate effect and without consideration by one person in favour of another and the acceptance of the same by that another himself or by some one authorised on his behalf is called 'gift', provided that one making the gift must totally renounce all his title and rights in the property gifted away of his independent free will.

Definition
of Gift

COMMENTARY

'Hiba' or 'Gift' literally means the giving away of such a thing from which the person in whose favour the gift is made may draw benefit. The definition of the Hiba or Gift as given in *Kanz al Daqāiq* is "that Hiba is the making of another person owner of the corpus of property without taking its consideration from him".¹

Najmud Din Abū Ja'far Al-Hilli in his noted work, *Sharai'al-Islam* on Shi'a *fiqh* has defined "Hiba" as a covenant that demands the making of a person immediately owner of a property without consideration in a manner that be free from an intention of nearness (to God). (Here a distinction is maintained between *hiba* and *sadqa*). Sometimes gift (*hiba*) is interpreted from the words, *Naḥlah* and *'Aṭiyah* i.e. gift and donation.²

The basis of the principle of gift is the prophet's saying "Exchange gifts among yourselves so that love may increase".³

Under Section 122 of the Transfer of Property Act, 1882, as in force in Pakistan, Gift (*Hiba*) has been defined as under:—

"Gift (*Hiba*) is the transfer of certain existing movable or immovable property made voluntarily and without consideration, by one

¹Al-Nasafi, 'Abdullah b. Maḥmūd; *Kanz al-Daqāiq*, Cairo, p. 352:

”هي تملك العين بلا عوض“

²Al-Hilli, Najm al-Din Abū Ja'far; *Sharā'i' al-Islam*, Beirut, vol. ii, p. 253.

³Al-Marghināni, Burhān al-Din; *Al-Hidayah*, Qur'ān Maḥal, Karachi, vol. iii, p. 283 :

”تهادوا تحابوا“

person, called the 'Donor', to another, called 'Donee' and accepted by or on behalf of the 'Donee'.

Such acceptance must be made during the lifetime of the 'Donor' and while he is still capable of giving.

If the 'Donee' dies before acceptance, the gift is void".

Renunciation of title and rights in the property :

It is essential in gift that the donor must totally renounce all his title and rights in the property transferred by way of gift.

Words constituting gift should be clear and unequivocal. The intention of the one who makes the gift depends upon his renouncing completely the property gifted in favour of the donee. If the one making the gift continues exercising the rights of ownership in respect of the property given in gift, the gift shall be considered to be null and void.

Gift must be made voluntarily. Gift made under compulsion shall be considered to be null and void.

Pakistan ruling—Gift by 'Pardanashin' Lady: Where the gift was made by an old infirm *pardanashin* lady living with one of her sons, who is alleged to have looked after her for sometime and after having secured the gift deed from her showed no desire of keeping her with him any more. The document was executed in a language which was not understood by the illiterate lady, having no independent advice. She was being shadowed by the donee before the *Wasiqanawis*, the Doctor and the Registrar. In the circumstances, she cannot be considered to have entered into this transaction, depriving her equally dear and near heirs excepting the donee, of her independent free will. The gift was therefore invalid. [PLD 1966 Peshawar 121].

Gift to unborn person : A gift to an unborn person is void. (9 Bom. 158-36 Cal. 431-21. C 291.)

Section 184. Gift is a covenant that is constituted by proposal and acceptance and gets completed by possession.

Gift—a
Covenant

COMMENTARY

Like other agreements the constitution of gift also depends upon proposal and acceptance. It is said in, *Al-Mukhtaṣar* by *Qudūri*, *Kanz al Daqāiq* and *Hidāyah* that gift is constituted by proposal and acceptance and gets validity by possession.⁴

⁴Al-Qudūri, Abul Hasan ; *Al-Mukhtaṣar*, Qur'ān Mahal, Karachi, p. 128 ; Al-Nasafi ; op. cit., op. 352 ; Al-Marghinanī : op. cit., p. 283.

A gift is undoubtedly an agreement and an agreement is completed by proposal and acceptance. So far as possession is concerned it is essential for the proof of title, not for the constitution of the gift. If in a gift transaction proposal and acceptance be present it would be said that gift has been made. But in case of the non-delivery of possession, the gift shall be held to be incomplete and inoperative.

Section 185. Gift is not complete until the donor does not deliver the possession of gifted property to the donee.

Completion
of Gift

Exception : In case of property the possession of which cannot be made over the completion of gift shall stand proved from such acts of the donor that make it patently clear that he has renounced his rights and title in the said property.

COMMENTARY

There is a difference of opinion among the jurists on the question whether the transfer of possession of the property in gift is essential for the completion of a gift or not ?

Difference between Hanafis and Malikis:

According to the Hanafis a gift shall become perfect by proposal and acceptance but the title of the donee shall become perfect only when he takes over possession of the property given in gift.

According to Imām Mālik the title in the property given in gift, like a sale, is established without transfer of its possession to the donee; but according to Hanafis the title of the donee is not established without transfer of its possession.⁵ The Hanafis in support of their assertion quote the tradition of the prophet, "Gift is not valid except when the Donee gets the possession of the property in gift."^{5-a}

The Hanafis in connection with the gift take support from the tradition quoted above. But this tradition, in fact, is not *marfū'* i. e. its chain of narrators does not reach the Prophet. According to 'Abdul Razzāk it is an assertion of Ibrahim Nakh'i, a Tabi'i, successor of the Companions of the Prophet. Yet, it is a fact that gift without making over possession is not perfect. Imām Mālik's analogy of the property sold with the property

⁵Al-Marghinanī ; op. cit., p. 283.

^{5a}

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given in gift (without possession) is not correct. Gift is a matter of benefaction; it has no analogy with sale, as sale is a contract for consideration or exchange. If by merely making a gift (without transfer of possession) the donee's title is held to be created in the property it would entail the obligation of transferring the possession of property to the donee without delay. Whereas gift being a matter of benefaction the donor can not be compelled to deliver possession of the property specially when there is no right of the donee against the donor, until possession is delivered to him. Hence, the view of Imām Mālik does not appear to be correct that without transfer of possession of the property in gift the title of the donee gets created therein. On the other hand, the view-point of the Ḥanafis that simply by proposal and acceptance title is not created in the property in gift prior to the transfer of its possession appears to be correct. Consequently, if 'A' make a declaration of gift of his property to 'B' who accepts it, yet, 'A' retains possession of it, 'B' on the basis of the said declaration of gift made in his favour cannot get 'A' dispossessed of that property.

Tradition of 'A'ishah :

In the '*Muwatta'*' of Imām Mālik a report from 'Ā'ishah states that the Caliph Abū Bakr made a gift in favour of his daughter 'Ā'ishah of 20 *wasaq* (a weight) of dates that had not then been plucked from the trees and the time of the death of Abū Bakr approached him. Abū Bakr said to 'Ā'ishah, "If you had taken possession of the dates they would have been yours. Now you shall distribute them in accordance with the law of inheritance among all the heirs."

'Abdul Razzāq has, on correct credentials, also reported that Caliph, 'Umar has held transfer of possession a condition for the perfection of the gift. Same view has been reported from the Caliph 'Umar b. 'Abdul 'Aziz that in a gift making over possession of the property given in gift is a condition, and without making over its possession to the donee, his title does not get established.^{5-b}

Al-Sarakhsi in his noted work, "*Almabsūṭ*," has further discussed the question thus: "According to us (Ḥanafis) in gift the title in the property does not get established merely by declaration prior to the getting possession of it, whereas according to Mālik it does get so established. According to him gift is a settlement of property and the proof of the settlement of property does not, in a gift, depend upon the transfer of possession, as is also the case in a sale. The title is rather better established in gift than in

^{5b} Al-'Asqalānī, Ibn Ḥajar : *Al-Diraya fī Takhrīj Aḥādith al-Hidāyah*, Delhi, 1350 AH., p. 303 ;

sale because in 'sale' the necessity for the establishment of title is on both sides, whereas in 'gift' such necessity arises only at one side (for its establishment). Thus, in case of sale when merely the declarations made from both sides make the title perfect, the same made by one side alone should preferably establish the title in gift.

On this question, the Hanafis argument is based on the narrative related from the Prophet, "Gift is not valid but with possession".^{5-c} It means, the validity (of a gift) does not get established i.e. the validity of the ownership of the property. But there is consensus that 'gift' is constituted by mutual declarations before possession is made over (though validity is withheld till possession). The second reason is that gift is a matter of benefaction. The ownership of the donee does not get established in gift merely by declaration contrary to the case of a 'Will'. The principle is that a covenant made out of benefaction is in itself a weak one. That is why there is no compelling factor tagged with it and the established right of donor's ownership is strong. This would not get extinguished because of a weaker cause till it does acquire that ingredient which makes it strong. In 'Will' that ingredient is the 'death of the maker of the 'Will', which negates his ownership."⁶ So in gift it is the delivery of possession by the donor to the donee which negates the donor's and establishes the donee's ownership.

Imām Sarakhsi proceeds that "it is related from 'Ā'ishah who said, 'My father made a gift of 20 *wasaq* of unplucked dates from his property which was in 'Ā'liyah (name of a place). When his last moment approached him he praised God and said, 'I made a gift of 20 *wasaq* of unplucked dates to you from my property at 'Ā'liyah, you have not taken possession of them, neither have you separated them. Hence the (whole) property belongs to the heirs."⁷

"From this tradition of 'Ā'ishah it stands proved that gift without transfer of possession is not complete. In case of such transfer of possession, a stranger or a son, both being majors stand on the same footing. It is also proved that where the property is divisible, gift made without division is not complete. Here Abū Bakr held the gift made in favour of 'Ā'ishah null and void, on the grounds both of 'non-delivery of possession' and 'non-division'. From the same tradition it is also made out

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⁶ Al-Sarakhsi : *Al-Mabsūṭ*, Cairo, 1324 A.H., vol. xii, p. 48.⁷ Ibid, p. 49.

that by itself the gift of undivided property which is divisible is not essentially null and void. Indeed in case of a gift of undivided property which is divisible (*mushā'*) ownership does not pass till the said undivided property is divided, in the same way as the ownership without transfer of possession is not complete. We (Ḥanafis) therefore shall not hold that gift prior to giving possession is ab initio null and void. The tradition also lends support to the fact that delivery of the property of gift (by donor) subsequently is like the initial settlement (on donee) of property and Abū Bakr on account of his (death) illness had abstained from the delivery of the dates, because it is forbidden for a man suffering from 'death illness' to make a gift in favour of his heirs. From the same incident it can also be argued that the rights of the heirs get tentatively attracted to the property of the man who is suffering from death illness".⁸

Possession in gifts to minors :

Al-Sarakhsi, further on, writes that 'Umar and 'Uthmān said: 'When someone makes a gift in favour of his minor child his mere declaration of the gift makes it valid.' We (the Ḥanafis) conclude from these opinions of 'Umar and 'Uthmān that in such a gift the right of taking possession of the property on behalf of the minor, belongs to the father. If the one who makes the gift is himself in possession (of what has been given in gift), the gift is completed by such possession and what is then absolutely necessary is that such gift be declared because the child cannot lay exclusive claim to it unless he knows what has been given to him by way of gift. This is also the meaning of the narrative that has been stated by Shurayḥ. He was asked, 'What is the thing that validates gifts made by a father in favour of his minor child?' Shurayḥ replied, "Evidence on gift", meaning thereby the 'declaration of the gift', because evidence by itself is no condition for the completion of the transaction of gift. The declaration is for the sake of giving strength to gift, so that it may be within the power of the son to prove his title as against all the heirs.⁹

Muhammad al-Shaybāni has said, "If either the 'Donor' or the 'Donee' dies before the delivery of possession of the property, the gift made shall be void. Gift is completed by the delivery of possession. Delivery of possession in gift is like the acceptance in sale, because it proves the title. As the death of either the seller or the purchaser after the proposal but before its acceptance makes the proposal void, similarly the death of either

⁸ Ibid, pp. 50—51.

⁹ Al-Sarakhsi : *Al-Mabsūṭ* : op. cit., vol. xii, p. 51; Ibn Najaym : *Baḥr al-Rā'iq*, Cairo, 1311 A.H., vol. vii, p. 288.

the 'Donor' or the 'Donee' before the delivery of possession makes the 'Gift' void."¹⁰

Donee and possession :

Muhammad al-Shaybāni has said, "If the property being given in gift is available at the place where the gift is being made and the 'Donee' takes possession of the property with the permission of the 'Donor', it shall become the property of the 'Donee'. If its possession is taken without the permission of the Donor such taking possession shall not, on the basis of *Qiyās*, make the Donee owner of the property. But on the basis of *istihsān* he shall become its owner. There is a clear manifestation (*naṣṣ*) in favour of this view in *Kitāb al Ziyādāt*".¹¹

The argument on the basis of *Qiyās* runs thus: "That the property given in gift is the property of donor and no one has the right to take possession of the property belonging to another without his permission, because such a possession shall be usurpation and not the possession in the natures of proprietorship. Proposal in a contract like that of sale is not by itself permission for possession. Hence, if a purchaser, without the permission of the seller and prior to the payment of the money in consideration, takes possession of the property in sale, his possession shall not be said to be with the consent of the seller. Even if the property in sale is present there, the seller's right of its retention does not lapse on the basis of a contract for sale, although the purchaser does become the proprietor of the property in sale and only takes possession of what is his property. How can then a donee, on the basis of mere declaration of gift, become proprietor? Therefore, his possession can not be held to be proprietary in the absence of specific permission from the donor for such possession.

The argument, on the basis of *istihsān*, is that possession of gifted property in a transaction of gift is like acceptance in a contract of sale. So, proposal in sale amounts to permission for taking possession too in case it is accepted. Likewise, proposal in 'gift' carries with it permission to transfer of possession for completing the 'act' of favour (gift), and this is only confirmed by making over the possession. Hence, possession is no more than the (means of) achieving the purpose of gift.

If the property to be given in gift is not present at the place of making gift and the donee has taken its possession after the donor and the donee

¹⁰ Al-Sarakhsī : op. cit., vol. xii, p. 57.

¹¹ *Ibid* ; Damād Āfandī : *Majma' al-Anhur*, Cairo, 1327 A.H., vol. ii, p. 354; Al-Murghinani : op. cit., vol. iii, p. 283.

have separated, the donee does not become its owner without the permission of the donor. If the donee has taken possession (of the same) with the permission of the donor it has two aspects: One on the basis of *Qiyas* and the other on *istihsān*. On the basis of *Qiyas* it does not make the donee proprietor, whereas on the basis of *istihsān* such possession makes the donee owner of the property given in gift, as a contract is constituted by proposal and acceptance and the possession is required only to give a sound factual basis to ownership. This completion of ownership may also take place after departing of the parties from the place, *majlis* of gift. However, taking possession is dependant upon the express or implied permission of the owner. When the thing, therefore, being given in gift is not present its implied possession does not prove permission except when the possession of the property has passed from the donor with his express permission.¹²

Shi'ah point of view :

Najmuddin Abū Ja'far Al-Hilli writes in his famous work, *Shara'i' al-Islam*, that the contract of gift is dependant upon proposal, acceptance and transfer of possession. By 'Proposal' is meant every word by which it is intended to make a person the owner of a certain things, for instance, 'I gave that thing in gift to you' or 'I made you owner of that thing etc.'¹³

Al-Hilli has further said that for the validity of the gift it is a condition that the 'donor' must be major, possessed of complete wisdom and in valid control of the property.¹⁴

According to the Shi'ah jurists as long as the possession on the property gifted is not established the gift shall not be valid. If someone on making a gift of a property admits of making over its possession to the donee an order shall be passed in accordance with the same, although the property gifted be in his (the donor's) possession. After that, if he resiles from his admission it shall not be accepted.¹⁵

After the gift, if there is a delay in making over possession of the gifted property (i.e. if possession of the property does not follow immediately after its gift) and thereafter the donor makes over its possession, the passing of ownership to the donee shall be considered from the time of the transfer of possession and not from the time of its gift.¹⁶

¹² Al-Sarakhsi : op. cit., vol. xii, 57.

¹³ Al-Hilli : *Sharai' al-Islām*, Beirut, vol. ii, p. 253.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Ibid.*

If a father or grandfather makes a gift in favour of his minor child, the gift by its very declaration shall become effective as its possession is with the guardian himself. If someone other than the father or the grandfather makes a gift in favour of the minor, though the maker of the gift may or may not have guardianship over the child, the taking possession on behalf of the child has to be established. Hence if the donor is a person other than the guardian then the possession of the gifted property shall be taken by the guardian of the minor or an officer of the Court on behalf of the minor; or if the donor (other than his father and grandfather), is himself the guardian of the minor the guardianship of property shall vest in the said guardian or an officer of the Court to whom the possession of the gifted property is to be made over.¹⁷

It is also laid down in *Shara'i' al-Islam* of *Shā'ī fiqh* that for valid possession donor's permission is a necessary condition. Thus, if a property given in gift is taken possession of by someone without the donor's permission the property shall not vest in the person in whose favour the gift has been made. If, however, the gift is made of the property which is already in possession of the donee it shall be valid. For its validity the permission of the donor or the time required for taking such possession is not needed.¹⁸

Zahiriyyah View :

According to the Zāhiriyyah a gift is completed by the very utterance of the word, 'gift'. There is no necessity, thereafter, to give permission for taking over possession. Same is the verdict, according to them, in donations and pious offerings. The donor has no right to retract after his uttering the words of 'gift'. If the donor, after making the gift, exercises his proprietary right over the thing donated, still the gift made shall not be void; rather the exercising of proprietary right by him shall be void and the property would be deemed in his custody as trustee (*zāmin*).¹⁹

Donee in Possession – Hanafi View :

When a person places a thing in trust with another person and thereafter he makes a gift of the thing to him without the said thing being

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ Ibn Ḥazm : *Al-Muḥalla*, Cairo, vol. vi, p. 147.

present before them, such gift shall be valid if the donee says that he accepts the gift. In such a case taking possession afresh is not necessary.²⁰

Shi'ah's Point of View :

Same is the rule of conduct of the Shi'as as well. ^{20-a}

Pakistan Rulings :

Delivery of Possession : The Supreme Court of Pakistan has, in the case of *Shamshed Ali vs. Syed Hassan Shah* held that "Under the Muhammadan Law the delivery of possession to the donee is a condition precedent to the validity of gift..... At the same time the legal requirement is that there should be delivery of possession by the donor. Taking of possession by the donee without the permission of the donor is of no effect."²¹

Essentials of gift—actual possession must be given to donee : The three essentials of a valid gift under Muslim Law are : (i) a declaration or gift by the donor; (ii) an express or implied acceptance of the gift by the donee; and (iii) seisin, the delivery of possession of the gift property by the donor to the donee. It is of the essence of a gift that it should be completed by delivery of possession. The delivery of possession by the donor as a conscious, unequivocal and distinct act on his part is necessary to perfect the gift made by him. Mere registration of the deed of gift does not cure the defect in the delivery of possession to the donee. (PLD 1967 Lah. 336—PLR 1968 (1) W. P. 665—19 DLR (W.P.) 31).

The delivery of possession by the donor as a conscious, unequivocal and distinct act on his part is necessary to perfect the gift made by him. Where, therefore, the land in dispute was in cultivating possession of the tenants and the donee was Mukhtār of the donor and he was collecting the produce from the tenants, it was held that the mere declaration in the gift-deed that possession was delivered to the donee was not sufficient to complete the gift. (1972 SCMR 50. 1972 SCMR 267).

Where the gift was a simple deed of gift without any payment of consideration, as the gift was not accompanied by delivery of possession of the suit land, it was invalid. (1970 DLC 199-22 DLR 316).

²⁰Al-Sarakhsi : *Al-Mabsūṭ* : op. cit., xii, p. 58; Ibn Humām., *Faṭḥ al-Qadir*, Cairo, vol. vii, p. 125; Ibn Nujaym : *Baḥr al-Rāiq*, Cairo, vol. vii, p. 287.

^{20a}Al-Hilli : op. cit., pt. iv, p. 253.

²¹PLD 1964 S.C. 143 at p. 152, 164.

“It is well known that Muhammadan Law has prescribed just three simple but very essential requisites for a valid gift. These are : (1) a declaration of gift by the donor, (2) acceptance of the gift, express or implied, by or on behalf of the donee, and (3) delivery of possession of the subject-matter of the gift by the donor to the donee. In simple words, the three acts involved are that the donee should make a declaration of gift and give the gift property to the donee, and the latter should accept it. It is not even essential that the gift should be made in writing, for a written gift is as good as an oral one. The Privy Council upheld a verbal gift. Writing is, therefore, not essential to the validity of a gift, either of movable, or of immovable property. No mutation of names in the Record of Rights is also necessary to complete the transfer of possession of the gift property. A gift of lands in occupation of Haris may be completed by the donor asking the Haris to attorn to the donee, or by delivery of title deeds, or, by getting the mutation-entries effected in donee's favour in the Record of Rights. A husband making a gift of the house to his wife which is in their joint occupation, may complete the delivery of possession of the corpus of the gift which is one of the essential requisites of a valid gift, by making a declaration to the effect that he gives the house to his wife as a gift along with its possession, on his wife accepting the property, the gift would be complete and valid under the Muhammadan Law. The same procedure would be true in the case of a house let out to the tenants, or in the case of land cultivated by Haris, if the tenants or the Haris are asked by the husband to attorn to his wife. In such cases the facts that the husband continues to live in the house or receives the rents from the tenants, after the date of the gift, would not invalidate the gift, the presumption being that the rents were received by him on behalf of his wife, and not on his own account. No transfer of possession is required in the case of a gift by a father to his minor child or by a guardian to his ward. All that is, however, necessary is to establish the bonafide intention to make the gift. The requirement of change of possession in such a case is not necessary for the father himself is the person to receive possession as the guardian of his son. Similarly, no change of possession is necessary in the case of a gift by a grandfather to his minor grandson if the father is dead, for the grandfather is the lawful person to take delivery on behalf of his grandson as his guardian. (*Ali Ahmad v. Government of Sind*, PLD 1976, Karachi 316 at pp. 333, 336).

Gift and Registration : Notwithstanding the amendment of section 49 of the Registration Act by Registration Amendment Ordinance, 1962 the unregistered gift deeds were admissible in evidence. The donor and the donee were governed by Muslim Law and execution of the documents was

not *sine qua non* for the validity of the gift. The impugned gift had to be examined with reference to the provisions of Muhammadan Law and that no sooner it was clear that there had been a delivery of possession of the donated property, the gift was complete and irrevocable, for, the parties were related in prohibited degrees.

A gift by a Muslim would be complete even if there is no writing and it depends for its validity upon (1) a declaration of gift by the donor; (2) acceptance of the gift expressly or impliedly by or on behalf of the donee, and (3) delivery of possession of the subject-matter by the donor to the donee. If these three conditions are complied with gift is complete. Registration of the document will not be helpful if either of the aforementioned conditions are not satisfied. A written instrument in any case would not create a gift but is a mere evidence of the gift and as such would not in the case of a Musalman require registration. The Court thus held that the gift was, therefore, complete under the Muhammadan Law and as such operative notwithstanding the non-registration of the gift deed itself. (*Abdul Ghaffar vs. Ghulam Jan* P.L.D. 1975 Peshawar p. 12).

Subject-matter of gift not capable of possession: It is true that the delivery of possession by the donor to the donee is necessary to validate a gift but it is equally well established that when the subject of a gift is not capable of actual possession, the gift may be perfected by appropriate acts on the part of the donor which may have the effect of transferring the ownership to the donee. When the mortgagor himself is in possession of the mortgaged property, a gift of equity of redemption is not valid unless he delivers possession of the property to the donee but where the mortgagee is in possession the mortgagor cannot deliver possession to the donee, and the gift, may, in that event, be completed by some other appropriate method. [PLD 1971 Azad J & K 55 (DB)].

No doubt a gift of immovable property of which the donor is in actual possession will not be complete unless the donee formally enters into possession. But where the donor himself is not in actual possession, except constructively or fictionally, failure to hand over physical possession of the gifted property will not derogate from the completeness of the gift if the donee is otherwise in a position to exercise full ownership rights in relation thereto. (PLD 1971 Kar. 708).

Gift of "Adna Milkiyat": A'lā Mālīks were the superior owners of the land with a right to receive privileged rent without any right to cultivation such as was possessed by *Adnā Mālīks* or those who were in actual cultivation and possession of the land. A'lā and Adnā Milkiyat rights,

sometimes, co-existed in the same person. The rights of superior ownership which were possessed by donee by virtue of mutation No. 54 did not make him a co-sharer in possession of the land. By contrast the declaration in the mutation entry No. 57 conferred on him, rights in the land itself constituting a different tenure from that which was conferred by mutation No. 54. To constitute a valid gift of the land under mutation No. 57, it was essential that possession of the gifted land should have been given to the donees such as it was capable of. As possession was not delivered, the gift was void even if it be conceded that the other formalities for the making of the gift were completed. (1968 SCMR 859).

Proof of possession : The donee must prove some act showing control over land, in order to prove that the gift was complete. The evidence produced in this case has proved that possession had been transferred and the donee was in control of the land in dispute and, therefore, the gift was complete. (PLD 1970 Lah. 502).

Bank Accounts : In a case where father opening Bank accounts in the names of his sons and daughters but himself operating them and never parting with dominion over monies deposited by him it was held by a Division Bench of the Lahore High Court that it was not a case of gift, as no transfer of proprietary rights from father to the children was proved. (PLD 1977 Lah. 763).

Gift by father to his minor child : M.R. Kayani and Habibullah Khan JJ. have in the case of *Aurangzeb vs. Daud Khan* held that "the delivery of possession is one of the three conditions of a valid gift. But delivery of possession is not necessary when gift is made by a father to his minor son or by a guardian in favour of his ward under his guardianship. All that is necessary is to prove the gift itself. Hence, in the case of a grandfather making gift in favour of his minor grandson who is under his guardianship, the actual delivery of possession of the gifted property to the minor is not necessary as the grandfather shall be holding the property on behalf of the minor".^{21-a}

It is true that delivery of possession is one of the three essentials of a valid gift but it is now an established law that no transfer of possession is required in the case of a gift by a father to his minor child or by guardian to his ward. All that is necessary is to establish a *bonafide* intention to give. Similarly no change of possession is necessary in the case of a gift by a grandfather to his minor grandson if his father is dead,

^{21a}PLD 1957 Pesh. 85.

for the grandfather is then the person to take delivery on behalf of his grandson as his guardian.

After a gift has been completed its validity is not affected by a subsequent change of possession of the subject of the gift. (*Hakim Khan vs. Aurangzeb* (PLD 1975 Lahore, p. 1171 at pp. 1176, 1179); Ref. *Mohammad Ibrahim and others v. Muhammad Shah* PLD 1963 BJ1; *Aurangzeb and others v. Daud Khan and others* PLD 1957 Pesh. 85; *Ghulam Hassan v. Sarfraz Khan* PLD 1956 SC (Pak) 309; *Bahadur v. Jan Mohammad* PLD 1960 Kar. 745; *Nazeer Din and others v. Mohammad Shafi and others* AIR 1936 Lah. 92; *Shafi Ullah v. Ghulam Jabbar* PLD 1955 Lah. 191; *Hamid Ullah v. Ahmad Ullah* AIR 1934 Bom. 21; *Bibi Kaniji Fatima v. Jai Narain Ram and others* AIR 1944 Pat. 334 and *Sh. Mohammad Mumtaz v. Zubaida* AIR 1911 All. 466).

Oral Gift : According to Muslim Law, an oral gift is complete as soon as a declaration of gift by the donor, acceptance by the donee and delivery of possession by the donor to the donee has been effected. When these essential conditions are complied with, the gift becomes perfectly valid and if a written deed is executed afterwards, the deed may not be admissible in evidence for want of registration but the oral gift would be valid notwithstanding. (AIR 1936 All. 600; 164 I.C. 515; 3 All. 266).

De facto guardian : A person may neither be a legal guardian nor a guardian appointed by the Court but may have voluntarily placed himself in charge of the person and property of a minor. Such a person is called *de facto* guardian. A *de facto* guardian is merely a custodian of the person and property of the minor.

If the father of an infant donee is alive and as a natural guardian the duty to take care of and manage the property of his minor son or daughter falls on him then possession should be delivered to him to perfect the gift. But if, as in the present case, the minor has been adopted by the donor and he takes entire care of his person and property, then the rule enunciated by the judicial committee will be found that the adoptive father occupies the position of a *de facto* guardian of the person who takes care of the infant as is the rule in the case of gifts by the father to a minor son. (*Mohd. Afzal vs. Khursheed Begum*, PLD 1975, Peshawar p. 24 at pp. 27, 28).

Essentials of gift : Muhammad Yaqub Ali Khan and A.R. Changez JJ. held in the case of *Shamshad Ali Shah vs. Hassan Shah* that, "Under the Muhammadan Law it is essential to the validity of a gift that there should be (i) a declaration of gift by the donor, (ii) an acceptance of the gift by the

donee, express or implied, and (iii) it should be accompanied by such delivery of possession as the gifted property is susceptible of".^{21-b}

It is, however, an accepted position of law that when the subject matter of gift is not such that its actual possession can be made over, then the donor's taking appropriate actions that show his intention of the transfer of that subject matter to the donee shall complete the gift.

The West Pakistan High Court, Lahore in the case of *Mansoor Raza vs. Syrria Begum* held "The mother is only entitled to the *hizānat*, i.e. the custody of the minor children upto certain ages but cannot be the guardian of the person of the minor during the lifetime of the father. The father remains the guardian for all times inspite of the fact that the *hizānat* may be in the mother."²²

Hence, she is bound to follow the principle of transfer of possession in case of her making gift of property in favour of her minor children, as also held by the Supreme Court of Pakistan in the case of *Shamshad Ali Shah vs. Hassan Shah* earlier quoted that "Under the Muhammadan Law the delivery of possession to the donee is a condition precedent to the validity of the gift".

It was further held that "mere recital of delivery of possession in the Deed of Gift is not enough except when the donor is the father and guardian of the donee. Hence, gift without delivery of possession is void *ab initio*".²³

The Supreme Court of Pakistan in the case of *Rabia Khatoon vs. Azizuddin Biswas* held, "It is well established that under Muhammadan Law to perfect a gift it is essential to deliver possession of the corpus of the gift to the donee as evidence of complete divestation on the part of the

^{21b}PLD 1960 Lah. 300; see also note 21 *supra*.

²²PLD Lah. 1059 at p. 1064. This rule applies in case there is some guardian or executor of the minor. If there is no one else except the mother who is the *de facto* guardian of the person and property of the minor, she shall be entitled to have possession of the property of the minor; her possession shall be deemed to be the possession of their minor child. Ref. Ibn-Nujaym., op. cit., vol. vii, p. 288. Al-Sarakhsi also holds that the possession of the gifted property to the minor in the hands of her mother shall be as that of his father, in case the minor is under the maintenance of the mother. Ref. (*Al-Mabsūt*, Cairo, 1324 A.H., vol. xii, p. 51, *Kitab al-Hiba*).

²³PLD 1964 S.C., p. 143.

donor and that if the natural father of a minor is alive, the possession should be delivered to him. It is equally well established that in case a father makes a gift to his infant son, by virtue of the gift he (the son) becomes proprietor and the same rule holds good where a mother makes the gift to her infant son, whom she maintained and of whom the father is dead and no guardian provided and so also with respect to the gift by any other person maintaining a child *in these circumstances*, (*Hedaya*). The words 'in these circumstances' were interpreted by their Lordships of the Judicial Committee in *Musa Miya* and another v. *Kadar Bux* to mean: 'When father is dead and no guardian has been provided'; but that was a case in which Abdul Rasul, the donor, had maintained and brought up his grandsons, the donees, from the time of their birth until his death; but during that time the father and mother of the two minors were also living with the donor. From this circumstance their Lordships felt persuaded to conclude that Abdul Rasul was a man of property and able and willing to support in his own house, his daughter, her husband and family. The ratio in the case, therefore, is that if the father of an infant donee is alive and as a natural guardian the duty to take care of and manage the property of his minor son falls on him, then possession should be delivered to him to perfect the gift. But if, as in the present case, the minor has been adopted by the donor and he takes entire care of his person and property, then the rule enunciated by the Judicial Committee will be found that the adoptive father occupies the position of a *de facto* guardian of the person who takes care of the infant as is the rule in case of gifts by the father to a minor son."²⁴

Gift by husband: A husband makes a gift in favour of his wife or a father makes a gift in favour of his son who has just attained puberty and is yet under his custody; such gift when it is announced shall be valid though its possession may not have been taken over by the donee. Ibn Abi Laylā infers from this statement that when the donee is in the custody the donor, right of possession of donor over the subject matter of gift is akin to the right in the gift made in favour of minors. According to Ḥanafis, however, it is not so. The Ḥanafis infer from the same statement of law that some kind of guardianship (control) of the person is necessary so that his possession on account of that guardianship (control), may be deemed to be the donee's possession of the property given in gift.

As a matter of fact after the child attains puberty (majority), that person has no right of guardianship over him though the child may continue to be under his maintenance. It is an accepted legal position that if some

²⁴PLD 1965 S.C., p. 665.

wealthy person makes over to them something *ex gratia* (*Sadāqa*) that kind of gift would not be completed merely because of its announcement; its possession too has to be made over to them.”²⁵

Pakistan Rulings :

Delivery of Possession : As an ordinary rule of Muslim Law a gift is to be followed by delivery of possession, that is, the donor is to deliver to the donee whatever possession he has, but the objection as to delivery of possession is one which can be taken either by the donor himself or by his heirs and in a case where the donor is himself supporting the gift no effect can be given to an objection by a third party who is in possession and claims adversely to both donor and the donee.

But where the donor is himself neither in actual nor in constructive possession of the property given, as was found in this case, he is not in a position to give either actual or constructive delivery, and a gift made by him, under the circumstances without a delivery of possession of either kind, cannot be enforced. (*Mohd. Azim v. Halima*, P.L.D. 1975, Peshawar, p. 60 at pp. 65, 66).

Possession and Gift : The Supreme Court of Pakistan, however, ruled that the gifted property in possession of trespassers claiming adversely can form the subject matter of a valid gift, without delivery of possession. It was observed: “It follows that for the completion of a gift of immovable property, delivery of possession is necessary only if the property that is subject of the gift is in actual physical possession of the donor; if such property is under the occupation of a tenant, the donor can complete it by requesting the tenants to attorn to the donee or delivery of the title deed etc. In case when the subject-matter of the gift is an immovable property in possession of a trespasser who claims it adversely, the donor can complete it by admitting the claims of the donee and divesting herself completely of all ownership and dominion over the subject of the gift as has been done in this case. The factum of non-delivery of possession under the circumstances of the instant case would neither render the gift invalid nor help the plaintiffs who claims the land adversely to both, the donor and donees.” *Munawar Hussain Shah and 2 others v. Mst. Bilora Bi & 3 others*. PLD 1978 S. C. p. 33 at p. 37).

Gift by Husband to Wife : The husband donated land to his wife at the time of marriage and possession of the gifted land had been transferred by mutation. The donee thereafter exercised effective control as landlord

²⁵Al-Sarakhsi : *Al-Mabsūt*, Cairo, 1324 A.H., vol. xii, p. 51.

over the gifted land which fact was supported by the entries in *Khasra girdawāri* and *jamabandis*. Land revenue receipts in the name of the donor (husband) and the fact that tenants were changed by the husband were pressed to support the plea that possession had not actually been delivered. The plea in the circumstances of the relationship of wife and husband was rejected and it was held: It must be presumed that all such acts done by the husband subsequently with reference to the gifted property were done on his wife's behalf and not on his own." (PLD 1970 Lah. 502).

Gift of equity of redemption : A gift may be made by a mortgagor of his equity of redemption and if it can be shown that the donor has divested himself completely of ownership and dominion over the equity of redemption, no valid exception can be taken to such a gift. What is the nature of delivery of possession of equity of redemption is a question of fact in each case and no hard and fast rule can be laid down.

The gift of equity of redemption having been complete and the appellants donees being related to the respondent-donor within the prohibited degree because had either of them been of opposite sex marriage in between them would have been void, even the revocation of the gift is of no avail to the respondent. *Mian Jinda and another v. Haji Ghulam Mohammad*, PLD 1975 Lahore 1090 at pages 1092 & 1094; Referred *Sadik Hussain Khan v. Hashim Ali Khan & others* 43 IA 212; *Mullick Abdool Ghafoor v. Muleka* ILR 10 Cal. 1112; *Chaudhri Mehdi Hassan and others v. Muhammad Hasan* 33 IA 68; *Tara Prasanna Sen v. Shandi Bibi* ILR 49 Cal. 68; *Anwar Begum v. Nizam-ud-Din Shah* ILR 21 All. 165.

Gift to son :

A person makes a gift in favour of his major son. The son is, however, under his care. The father does not hand over the gifted thing to his son. Similarly a husband makes a gift in favour of his wife and does not make over possession of the thing given in gift to his wife, such gifts shall not be valid. But according to the findings of Qādī Ibn Abi Laylā such gifts shall be valid. His argument is that the major son being under the care of his father is under his control; hence the father's possession (over the property given in gift) shall be as that of the property of his minor son. That is, it would be at par with the case of his (father's) making the gift in favour of his minor son. In this respect Ibn Abi Laylā's argument runs thus : The minor is, let us suppose, under the maintenance of a stranger and that stranger makes a gift in favour of that minor and the one who maintains the minor takes possession of the thing given in gift to the minor, the gift shall be complete though there is no other relationship between the two except that the stranger maintains the minor. The Hanafis say that a father has

no right of guardianship over his major son; likewise he has no right of guardianship over his wife other than the matrimonial rights. The possession of gifted property certainly is not a matrimonial right. Hence a husband and a stranger in this matter are on equal footing. Further, in case the father does confer a favour on his major son, therein his capacity is merely that of a donor. Accordingly, when he confers some favour to poverty-stricken people maintained by himself, his own possession cannot be the substitute of the possession of those poverty-stricken people for the completion of gift, and the gift without actually making over possession shall not be valid. As against this, the possession of the father who is the guardian of his minor son is valid. The Hanafis agree that the person who maintains an orphan, his possession, on behalf of that orphan, is valid when the orphan has no other guardian who is entitled to take possession on his behalf. The donee who is major is the guardian of his own self. He does not require that the person who maintains him should on his behalf take possession of the thing donated to him as is done in the case of a minor, when he is under the maintenance of a stranger and his father or grandfather is living.²⁶

Mother's Custody and Possession :

A father makes a gift of his entire property to his minor son, specifies such property and provides evidentiary record for such gift, the gift thus made shall be valid. The father with the declaration of gift (in favour of his minor son) takes possession of the thing given in gift and creates evidence for the same; his creating evidence by itself is no condition for the validity of the gift; rather the gift (because of its being made by the father) is automatically complete. Creation of evidence is a precautionary measure so that after the death of the donor it may remain immune from the denial by other heirs or from the denial by the father himself after the minor has attained majority. The reason is that the gift gets completed without evidence. Likewise when the child is under the maintenance of his mother she has a kind of guardianship over him and she protects the person and property of the child. This fact in the matter of guardianship is enough for her taking possession of the property gifted to the child.

If an orphan is under the care of his mother, she makes a gift of a thing to him and creates evidence for it and there is no executor appointed by the (late) father for the minor child, the gift made by the mother shall be valid and keeping possession of the thing by the mother shall be equivalent to the taking possession by the father had he been alive. Possession means acquirement (of control) which is in the nature of protection and the

²⁶*Ibid*, p. 61.

mother's guardianship includes the 'taking care of the property of the orphan'; hence the mother in the matter of taking possession of the property given in gift (to the orphan), is like the father,²⁷ in case there is no other guardian or executor.²⁷

Pakistan Ruling :

Gift by mother to minor children—transfer of possession necessary to complete Gift : The requirement of transfer of possession is dispensed with in the case of a father or guardian donor, guardian being the guardian of property. The mother is neither the guardian of the person nor of the property of minor children. Therefore she must transfer possession of the gifted property to the minor children to complete the gift; otherwise the gift will be invalid. (PLD 1966 (W.P.) Lah. 1059).

Gift by mother to daughter—Requirement of possession : Under the Muslim Law it is not always necessary for the donor to physically part with the possession of the gifted property. Mere intention on his and the donor's part is sufficient. Where the donor, his daughter, (the donee) and her husband all had been living in the same house and the gifted land had all along been looked after and managed by the husband of the donee, it was held that in such circumstances the formality of actual delivery of possession of the gifted land was not called for and the gift was valid. (PLD 1967 Lah. 1087).

Uncle's custody and possession :

An uncle of an orphan child under his maintenance takes possession (in place of the child) of the property given in gift to him although there is a brother or mother of the orphan alive. In the circumstances, the possession of the property by the uncle can be equated to that of the brother in the matter of guardianship for the purposes of protection of the property of the orphan. This taking possession shall be to the benefit of the orphan child because the close relationship of the uncle is like the close relationship of the brother. Moreover the relationship of the uncle is also strengthened by the fact that the orphan child is under his maintenance. Hence taking over possession by the uncle shall complete the gift made in favour of the orphan child under his maintenance.²⁸

²⁷ *Ibid.*

^{27a} Ibn Nujaym : op. cit., vol. vii, p. 288.

²⁸ Al-Sarakhsi : op. cit., vol. xii, pp. 61—62; Ibn Nujāym : op. cit., vol. vii, p. 288.

Suppose a stranger takes over the care of an orphan and maintains him. He is not the *executor* appointed nor there is any relationship between them; nor any other person is his executor. In such a situation taking possession of the gift in favour of the orphan by the stranger shall, on the basis of the rule of *istihsān*, be valid.²⁹

If a minor's father is alive and then taking possession, on the minor's behalf by his brother or grandfather, of the property given to him in gift is not valid.³⁰

Zahiriyyah :

According to Zāhiriyyah, as delivery of possession is no condition, gift made shall be valid, though the child be major, minor or a stranger.³¹

Indian Rulings :

Incorporeal rights : The gift of an incorporeal right is valid and complete if the donor has done all he could to put the donee in a position to get the benefit of the right gifted and also divests himself of all the signs of title to the subject-matter of the gift. (AIR 1917 Mad. 20; 38 I.C. 248). A gift may be made of debts *mālikāna* or *zamindāri* rights; property let on lease; (1884) 10 Cal. 1112) or an insurance policy. (AIR 1939 All. 744); a property under attachment may be the subject of a gift. (1898, 21 All 165). A gift may also be made of a right to receive a specified share in the offerings that may be made by pilgrims at a shrine. (141 C. 587).

Assignment of an insurance policy : In the case of an assignment of an insurance policy the provisions of Insurance Act 1938 apply. Section 38 (7) of the Act overrides Muslim Law and an assignment in favour of a person made with the condition that it shall be inoperative or that the interest shall pass to some other person on the happening of a specified event during the life of the policy-holder and an assignment in favour of the survivor or survivors of a number of person shall be valid, in spite of the provisions of Muslim Law to the contrary. (AIR 1939 All. 744).

Mutation of names : Mutation of names is not necessary to complete transfer of property in the case of a gift, (161 A. 205; AIR 1932 P.C. 13; 136 I.C. 385), and it does not serve as a valid substitute for delivery of possession. In case of gift of undivided agricultural land the intention of

²⁹ *Ibid.*

³⁰ Al-Sarakhsi : op. cit., vol. xii p. 63.

³¹ Ibn Hazm : *Al-Muhallā*, Cairo, 1352 A.H., vol. vi, p. 147.

the donor can be manifest only by mutation of record, delivery of possession, delivery of produce or attornment of tenants. (PLD 1975 Karachi, 491). But where the donor declared his intention to part with the possession of the gifted property and his intention was manifested by actual transfer of the property in the name of the donee in the Municipal and Government Land Record and he asked his tenants to attorn to the donee, it was held that there was proper transfer of possession to validate a deed of gift. (AIR 1925 Bom. 305; 86 I.C. 886). Where the gift made by the husband to his wife was followed by separate mutation petitions by him and his wife to the authorities concerned this fact was held sufficient to prove delivery of possession. (AIR 1963 Patna 229).

Gift to co-sharer : A gift of a house by one co-sharer in favour of another co-sharer already in possession of the house on behalf of all the co-sharers is valid, there being constructive transfer of possession. (AIR 1932 All. 370; 138 I.C. 841).

Gift to a non-Muslim : A muslim may make a valid gift under Muslim Law to a non-Muslim which is perfected by delivery of possession and the provisions of the Transfer of Property Act, 1882 do not apply to such a gift. (AIR 1929 Pat. 941). When the donee has obtained possession, the law that governs devolution of the property would be personal law of the donee. (AIR 1927 Mad. 572; 100 I.C. 62).

Gift to mosque : A gift may be made in favour of a mosque or any other institution and it will not be treated as a waqf. A mosque is a juristic person so a gift in its favour is valid. (AIR 1926 Lah. 372; 94 I.C. 7).

Section 186. Presence of a witness is not a condition for gift
Evidence of Gift being operative.

COMMENTARY

The ingredients of gift are proposal and acceptance. It is completed by making over possession. A gift in which the required ingredients are found and possession too has been made over, shall not be invalidated merely on the ground that there is no witness of the gift.

Section 187. Every sane and adult person is entitled to
Capability of making Gift transfer his property by way of gift to another person in existence, provided the gift is not made during death-illness of the donor or to frustrate the rights of or defraud his creditors.

COMMENTARY

The capacity of one for making a gift consists in his being sane and major. That is to say, it is necessary for the donor to be sane and major, while it is not necessary for the donee to be sane or major. Hence, if the donee is minor (or insane) taking possession by his guardian of the property given to him in gift shall complete the gift in favour of the donee.³² If the minor, provided he is sensible enough, himself takes its possession the gift shall still be valid.³³ If a father makes a gift in favour of his minor child, the proprietary right of the minor child shall get established merely by his making declaration of gift as the father's possession over the property shall thenceforth be on behalf of his minor child.³⁴

It is essential that the donee be alive. Hence gift made in favour of a child who is yet in the womb of his mother is invalid. Likewise, gift made, in spite of capacity, during death-illness, or made with the purpose of frustrating the creditors or made for defrauding others shall be invalid. Indeed, the rules of "Gift by means of Will" (*Hiba b'l Waṣiyyat*) may be made applicable in certain cases of gift made during death-illness. (For details see Sections relating to "Gift made in death-illness" and "Gift by will" *infra*.)

Gift to defraud :

"It was wrong to attribute the intention of defrauding the creditors to a certain person, simply because when he executed the gift deed, he owed some money to one or different individuals. The persons challenging the gift deed on account of that fact must bring some more material on the record to prove the guilty intention of the donor besides the fact that he was under debt at that time."³⁵

Section 188. Gift is valid of every thing, to with the words "What is that of which gift is valid?" "goods" or "valuable property" are applicable.

³²Dudūrī : *Al-Mukhtaṣar*, Karachi, p. 129; Ibn Nujaym : op. cit., vol. vii, p. 288; Al-Nasafi : *Kanz al-Daqā'iq*, Delhi, p. 252-53.

³³Al-Marghīnānī : *Al-Hidāyah*, Karachi, vol. iii, p. 287; Ibn Nujaym : op. cit., vol. vii, p. 288.

³⁴Al-Marghīnānī : *Al-Hidāyah*, vol. iii, p. 287; Al-Qudūrī : *Al-Mukhtaṣar*, op. cit., p. 129.

³⁵PLD 1950 Pesh. 45.

COMMENTARY

Every thing to which the term 'valuable property' is applicable may be given in gift. Hence the gifts of choses in action, negotiable instruments, proprietary rights, and landlord's or Zamindari's right, lands under attachment and the right of redemption all are valid. Likewise the gift of such a property is also valid which is, as against the donor, in adverse possession of others. Gift made of an immovable property at the time of auction by the auction purchaser in execution of a decree is valid, though the purchase of the property till then is not certified by the court and its possession has not yet been obtained by the donor, provided the donee is authorised by the donor to take its possession. It is preferred if by the deed of gift itself the donee is authorised to take its possession.

Gift of an object non-existent at the time of gift is invalid.³⁶ Hence donor's saying, 'I make a gift of all the fruit that this tree may bear' shall not be valid, because of the fruit being non-existent at that time. Similarly whatever gift is made by the donor saying, 'I make a gift of whatever is in the womb of my pregnant sheep' is void.³⁷ This is also the rule of conduct of man Ibn Hazm.³⁸

Section 189. It is not essential for the gift made under Islamic Law to be in writing.
 Gift in writing not necessary

COMMENTARY

Gifts made orally or in writing both are equally valid. If the proposal, acceptance and delivery of possession are there, the gift is legally considered to be complete.

Oral Gifts :

Wahiduddin and A. R. Khan JJ. in the case of *Wazir Begum vrs. Nur Jahan* held that the oral gift of immovable property is valid provided possession too has been made over to the donee. (P.L.D. 1961, Karachi, 165). Registration of a memo of gift already made orally was also not required (PLD 1978 BJ P. 17).

³⁶ Al-Sarakhsi : op. cit., vol. xii, p. 71; Al-Kāsāni : *Bada'i' al-Sana'i'*, Cairo, 1328, vol. vi, p. 119; Ibn Nujaym : op. cit., vol. vii, p. 287.

³⁷ Al-Sarakhsi : op. cit., vol. xii, p. 72; Al-Kāsāni : op. cit., vol. vi, p. 119; Ibn Nujaym : op. cit., vol. vii, p. 286.

³⁸ Ibn Hazm : op. cit., vol. vi, p. 142.

Section 190. (1) Gift of joint share in the property which is indivisible is valid. A divisible gift of joint share in a property shall be irregular (*Fāsid*).
 Gift of joint share in the property

(2) Gift of joint share in the property without division though it is divisible shall, from the time of the gift made, be considered to be valid under the following circumstances :—

- (a) When the gift is made by one heir to another heir.
- (b) When the gift is made of a parcel of landed property or a parcel of an estate.
- (c) When the gift is made of heritable property situated in a large commercial city.

COMMENTARY

Literal meaning of *mushā'* is 'undivided'. In juridical terminology a joint share in something is called *mushā'*.

The principle of *mushā'* is applicable only to gifts. It has no concern with transfers that are made for consideration including *Hiba bil 'iwaḍ* (gift in lieu of consideration).

If 'joint share' is divisible its gift is not valid. If the 'joint share' is indivisible its gift is valid.³⁹ The correct position is that the gift of divisible *mushā'* (joint share) is irregular (*fāsid*) and not void. By the gift being irregular it is meant that the gift though valid, donee's proprietary right is not created therein. In case of gift of *mushā'* (joint share) proprietary right shall vest only when the share given in gift, after division, is separated. For instance, a house is the joint property of A and B which is divisible. A makes a gift of his share, half of the house, to C. The gift made being irregular proprietary right of 'C' shall not vest therein until 'A' does not make over its possession, after getting his share separated, to C.

If the object under gift is indivisible, for instance a horse, its gift without division shall be valid because the same is indivisible. Being

³⁹Al-Qudurī : *Al-Mukhtaṣar*, Karachi, p. 129; Ibn Humām : *Fath al-Qadir*, Cairo, 1356 A.H., vol. vii, p. 121, 123; Al-Nasafi : *Kanz al-Daqa'iq*, Muḡtabā'ī, Delhi, 1338, A.H., p. 253; Al-Marghinani : *Al-Hidāyah*, Karachi, vol. iii, p. 285.

'divisible' means that the donee after its division may make use of it in the same manner as it was possible prior to its division. If it be not possible to make use of it in that manner, the object shall be held to be indivisible as horse, staircase, grinding machine, etc.

Hence, if *mushā'* (joint share) is divisible its gift is irregular;⁴⁰ It would, after the object of gift is divided, become regular. According to the Shi'ah *fiqh*, the gift of a joint share *mushā'* which is divisible is valid as is written in *Sharā-i'al-Islām* that the gift of *mushā'* is absolutely valid (whether it be divisible or indivisible).⁴¹

If a person makes a gift to another of wool still on the body of his sheep the gift shall not be valid. Likewise the gift of the milk which is still in its udders shall not be valid. Because firstly, the wool and the milk always go with the animal's body and have no existence separately. Secondly, the wool and the milk are divisible after removal which may, only after being separated from animal's body, be given in gift.⁴²

Gift of joint share in favour of heirs :

The term *mushā'* has been derived from the word *shuyū'* meaning 'dispersed'. If a part owner of a property makes a gift of a portion of that undivided property in favour of a stranger, there is an apprehension of dispute and wastage in the use of that property. But if that partner makes a gift in favour of another partner there arises no such apprehension. So making gift of property either divisible or indivisible, in favour of heir is valid but in both cases in favour of a stranger is invalid unless separated or divided in fact.

Gift of a part of property which is divisible is not valid until that part after division is not separated from the property of the donor; but the gift of a part of the property which is indivisible is valid because the property being indivisible delivery of possession of a part is impossible. Accordingly incomplete possession is held sufficient because this can only be done with such kind of indivisible property.⁴³

⁴⁰ Al-Marghināni : op. cit., vol. iii, p. 288—89.

⁴¹ Al-Hilli : op. cit., vol. ii, p. 253.

⁴² Al-Sarakhsi : op. cit., vol. xii p. 71; Al-Marghināni : op. cit., vol. iii, p. 287, Damad Āfandi : op. cit., vol. ii, p. 356.

⁴³ Al-Marghinani : op. cit., vol. iii, p. 287; Damad Āfandi : op. cit., vol. ii, p. 356.

The gift of a *mushā'* is valid. In the case of its gift, the possession shall be necessary in the same manner as it is in case of sale. If a person makes a gift of a property in favour of two persons and the two, after their acceptance, take possession of the property given in gift, each of them shall be owner of the property to the extent gifted to him. But if, of the two only one person accepts the gift and takes possession and the other refuses it, the gift shall be valid only for the one who takes possession.⁴⁴

According to Zāhiriyyah sect the gift of *mushā'* (joint share) is valid whether the object of gift is divisible or not; its gift is made either in favour of a partner or a non-partner or is made in favour of a rich man or poor, 'Uthmān Al-Batti, Mo'mar, Mālik, Shafī'i, Ahmad, Ishāq, Abu Thawr and Abu Sulayman all of them agreed on this. Same is the opinion of Ibrahim Nakh'i.⁴⁵

Pakistan Rulings :

It was held by Constantine and Lari JJ. in the case of *Begum v. Kazlanoo* that, "The doctrine of *mushā'* is wholly unadaptable to a progressive state of society and must be confined within the strictest rules. The rule of *mushā'* is in the nature of restraint on freedom to transfer one's property and should be limited to properties to which it had been actually applied in the past." Thus it was held that "the Courts should have refused to apply the rule of *mushā'* to gifts in respect of properties in commercial towns".⁴⁶

Justice Wahiduddin Ahmad in the case of "*Bahadur vs. Jan Mohammad*" (P.L.D. 1960, Karachi page 745) has held that "the doctrine of "*mushā'*" however, is not applicable to those cases where the gift is of a share in Zamindari or Taluke".

Chaudhari J. in the case of *Jabbar Permanak vs. Noor Jahan* (P.L.D. 1960 Dacca page 489) has held that "gift of undivided property made under Islamic Law whether valid or invalid, in case the possession of the property is actually given and taken gets effectively transferred. A gift made in common, in favour of two or more persons of a property comprising of a part of undivided immovable property which is divisible is not by itself void and it may be validated by subsequent arrangement between the donees."

⁴⁴Al-Hilli : op. cit., vol. ii, p. 253.

⁴⁵Ibn Hāzm.: op. cit., vol. vi, p. 182.

⁴⁶PLD 1957 Karachi 884.

The West Pakistan High Court, (Baghdadul Jadid) in the case of *Mohammad Ibrahim vs. Had Shah*, held that the gift of an undivided part of a property which is divisible is merely irregular, not void. Though the gift of "*mushā*" by itself is invalid but it may be made valid by making over its possession.⁴⁷

The Supreme Court of Pakistan in the case of *Shamshad Ali Shah vs. Syed Hasan Shah* said that in gift of *mushā* delivery of possession was essential.⁴⁸

In case a person makes a gift of a fixed share in an undivided immovable property and delivers possession of the whole immovable property as *mushā* such a gift shall not be valid. That is to say, according to the Ḥanafis, in a gift made of a *mushā*, the proprietary right of the donee shall not be created therein before its division and separate possession. But, according to Imam Shāfi'i the proprietary right shall vest in him and the gift made shall be complete.⁴⁹

If one out of two co-sharers of an indivisible property makes a gift of his undivided share in favour of his other co-sharer, the gift shall be valid.⁵⁰

If a person makes gift of his house in favour of two persons and gives its possession (in common) to them, then according to Imām Abū Ḥanifah, such a gift shall not be valid but according to *Ṣāhibayn* it shall be valid.⁵¹

If a person makes a gift of his house to two persons, giving to one 2/3 (two-third) and to the other 1/3 (one-third) share and makes over its possession in common to them, such a gift, according to Imām Abū Ḥanifah and Imām Abū Yūsuf, shall not be valid. But according to Imām Muḥammad such a gift shall be valid.⁵²

⁴⁷PLD 1963, B.J. 1.

⁴⁸PLD 1964 S.C. 143.

⁴⁹Al-Sarakhsi : op. cit., vol. xii, p. 64; Damad Āfandi : op. cit., vol. ii, p. 356.

⁵⁰Al-Sarakhsi : op. cit., vol. xii, p. 66; Ibn Nujaym : op. cit., vol. vii, p. 282.

⁵¹Al-Sarakhsi : op. cit., vol. xii, p. 67; Al-Marghīnānī : op. cit., vol. iii, p. 288., Damād Āfandi : op. cit., vol. ii, p. 385, Ibn Nujaym : op. cit., vol. vii, p. 290.

⁵²Al-Sarakhsi : op. cit., vol. xii, p. 68; Al-Marghīnānī : op. cit., vol. iii, p. 288.

If there are two co-owners of a house and one of them makes a gift of his undivided share *mushā'* to a stranger, such a gift shall not be valid.⁵³

Gift of mushā' where property is indivisible : A valid gift may be made of a *mushā'* or an undivided property, if the property is of such a nature that its enjoyment in an undivided condition is more profitable and advantageous than its enjoyment after division. (1968 SCMR 311 (2); AIR 1937 Cal. 500). Thus if a watery portion of tank does not admit of partition, an undivided share of the same may be the subject-matter of a valid gift, an undivided share of the banks of the tank also, which by its very nature can be used to better advantage in an undivided condition must be held to be valid. (AIR 1935 Cal. 739; 159 I.C. 678). A gift in the business of a Turkish bath is valid, for the bath is not capable of division, and would be ruined if it were divided. (AIR 1929 Lah. 309; 116 I.C. 899.) A gift of a right to use a common staircase is valid because a staircase is not capable of partition. (5 All. 285).

Gift of 'mushā' where the property is divisible : A gift of an undivided share in property which is capable of partition is invalid but not void. (PLD 1971 Pesh. 150 (DB)+PLD 1963 BJ 1=PLR 1963 (1) W. P. 77+AIR 1960 Pat. 297+AIR 1936 All. 473=163 I.C. 558). The gift being irregular, and not void, it may be perfected and rendered valid by subsequent partition and delivery to the donee of the share given to him. If possession is once taken, the gift is validated (1971 Pesh. 150. (DB) But see : 1968 SCMR 211 (2). The reason for the rule that the gift of an undivided share (*musha*) is bad is to be found in the desire to avoid what has been described as confusion. If the property is capable of separate possession, but nevertheless the donor does not separate what he intends to give from his other possession, one cannot find out what he intended to give and there is bound to be confusion. (AIR 1960 Madras 447 (DB). But in a recent case it has been held that the purpose behind the principle of *mushā'* is that the donee should not be put to inconvenience or difficulty in the case of an undivided share of the property. If that difficulty or inconvenience is not felt by the donee, then the question of invalidity of the gift on that basis would not arise. Therefore, gift of an undivided share of property which is capable of division cannot be hit by the principle of *mushā'* when the said share can be separated subsequently at the instance of the donee. If an omission has been made by the donor in not getting the said share separated while making the gift, the same can be rectified by the donee himself by getting it separated from the other co-owners. Even otherwise if

⁵³Al-Sarakhsi : op. cit., vol. xii, p. 69; Abdullah b. Mahmūd : *Al-Ikhtiyar*, li ta'lil al-Mukhtar, Cairo, 1951, vol. iii, p. 5.

the donee conveniently takes benefit out of the undivided share then the gift in respect thereof cannot be held to be invalid. (PLD 1975 Lah. 1170).

The doctrine of *mushā'* is wholly unadapted to a progressive state of society and must be confined within the strictest limits. [PLD 1957 Kar. 884 (FB)]. It is in the nature of restraint on freedom to transfer one's property and should be limited to properties to which it had been actually applied in the past. [PLD 1957 (W.P.) Karachi 884 (FB)]. The rule is not applicable to those cases where the gift is of a share in *zamindari* or *Taluka*. (PLD 1960 (W.P.) Karachi 745=PLR 1960 Karachi 492=PLR 1960 (2) W. P. 1350). Where the donor gives away by way of gift the entirety of her undivided share in an estate to two persons jointly, the gift is not bad. [AIR 1960 Madras 447 (DB)].

A gift of *mushā'* may be perfected and rendered valid by subsequent partition and delivery to the donee of the share given to him. (PLD 1963 BJ 1=PLR 1963 (1) W.P. 77+AIR 1960 Pat. 297+AIR 1936 All. 473=163 I.C. 558). A gift being indivisible, possession of any part of the property would make the gift operative. (AIR 1936 Lah. 92=161 I.C. 356).

The Courts have given effect rather to the spirit of the rule than to its letter and have upheld gifts in all cases in which the intention to give on the part of the donor has been expressed in most unequivocal terms, and has further been attended by all honest efforts on his part to complete the gift by divesting himself of the control over the property in such a manner as would clearly imply his divestiture in the eye of the law of the land. The only test that should be applied in such cases is whether the gift in question is open to any of these objections; or in other words whether the donor has still reserved to himself a loophole of escape or not. If this is not so, and if the donor has done all that the law requires to be done to separate himself from the property, a gift of *mushā'* will be as valid as that of property which can be physically handed over to the donee. Transfer of possession is no doubt the main thing and in very case this is the only thing to be seen. (PLD 1960 Dacca 489=12 DLR 149+AIR 1936 Lah. 92=141 I.C. 365+AIR 1960 Pat. 297.)

Shi'ah law: A gift of an undivided share is valid even when the property is capable of division. (1972 SCMR 295+PLD 1971 Kar. 708; Baillie ii. 204+36 I.C. 104.)

Gift of Mushā' in big commercial towns: The gift of a share in a freehold property in a large commercial town is valid from the moment of the gift even if the share be not divided off and delivered to the donee. (Law

Notes 1968 Lah. 42+PLD 1957 Kar. 884+PLD 1952 Lah. 545+1 LR 1908=35 Cal. 1=34 I. A. 167+AIR 1936 Lah. 92+AIR 1927 Lah. 413.) A house in Lahore (PLD 1952 Lah. 545) or Hyderabad, (PLD 1957 Kar. 884) is covered by this exception because both Lahore and Hyderabad are big commercial towns.

Gift to two or more persons. A gift of property capable of division made to two donees without dividing it is valid where the two joint donees have agreed among themselves either on the division of the property or on enjoying it jointly (PLD 1960 Dacca 489+PLD 1957 Pesh. 85+50 C.W.N. 81=27 PLR 433+15 I.A. 81+AIR 1960 Mad. 447 (DB)+AIR 1945 Pat. 334.) In such a case only tenancy-in-common and not a joint tenancy is created by the gift. (AIR 1948 Bom. 61=49 Bom. L.R. 561+PLD 1960 Dacca 489+Hedaya 485+Baillie 504.) The Court did not agree with the principle laid down by Mulla that "A gift of property which is capable of division to two or more persons without dividing it, is invalid, but it may be rendered valid if separate possession is taken by each donee of the portion of the property given to him. (Muhammadan Law by Mulla, 16th Ed. Para 161). It also observed that it is time that the curtain were rung down finally on a doctrine which, in this particular matter, has earned for Abu Haneefa's scholarship an 'unprogressive' name. Its exposition has become an obstruction to charitable or beneficent dispositions. There is no sense, logic or utility in rendering futile a gift where the two joint donees have agreed among themselves, whether on the division of the property or on enjoying it jointly.

Section 191. Gift of divisible property made without division in favour of two or more persons, with the exception of cases mentioned in Section 190 (2) shall be irregular. If each of the donees takes possession of the part of the property gifted to him, the gift shall become valid.

COMMENTARY

There is a difference of opinion on the point whether the gift made of divisible property in favour of two or more persons without actual division shall be valid or invalid. According to the view of the early jurists such a gift is invalid because at the time of making gift the gifted property is not divided inspite of being divisible. Therefore, the gift made, because of the share of each of the donees not being fixed, shall be invalid. The gifting of the property and its division according to them, should be simultaneous.

According to the view of the later jurist such a gift shall not be void. It shall, rather, become valid after the division of the property between the persons in whose favour it is gifted.⁵⁴ This view appears to be correct.

According to Shi'ah jurists the gift of a divisible property in favour of two or more persons is valid *ab initio* whether or not the donees divide the property among themselves.⁵⁵

Pakistan Rulings :

M. R. Kayani Habibullah Khan JJ. in case of *Aurangzeb vs. Daud Khan*⁵⁶ held that gift in favour of two or more persons jointly was valid. Justice Kayani observed, "It is time that the curtains were rung down finally on a doctrine which, in this particular matter, has earned for Abu Hanifah's scholarship an "unprogressive" name. Its exposition has become an obstruction to charitable or beneficent dispositions, and we see no sense, logic or utility in rendering futile a gift where the two joint donees have agreed among themselves, whether on the division of the property or on enjoying it jointly. Most people will be ignorant of the unserviceable provision and will see no fatality in making a joint gift in favour of brothers or sisters. It is for this reason perhaps that Judges in British India have been ready in holding that a joint gift is permissible even without specifying or dividing the shares of the donees."

Section 192. Subject to other conditions of the validity of gift
 Preferential gift. a preferential gift in favour of a stranger or an heir depriving the other heirs, though may be sinful is valid in law, except when the donor is *safih* (stupid) at the time of making gift.

COMMENTARY

The preferential gift is the one by which the donor makes a gift of his property in favour of his one or more than one child totally depriving his other children; or so much preference is given to the donee-child over his other children that no equitable proportion is maintained among them with respect to his properties.

⁵⁴Al-Marghinani : op. cit., vol. iii, p. 288.

⁵⁵Al-Hilli : op. cit., vol. ii, p. 253.

⁵⁶PLD 1957 Pesh. 85.

Qur'anic Dictate

There is no definite provision in the Qur'ān about the legality or illegality of a preferential gift. But there are several verses which give certain directions for dealing with property by Muslims in their individual and collective capacities, such as :

- (i) "Eat and drink but waste not by excess."⁵⁷
- (ii) And render to the kindred their due rights, as (also) to those in want and to the wayfarers : But squander not (your wealth) in the manner of a spendthrift."⁵⁸
- (iii) Those who, when they spend, are not extravagant and not niggardly but hold a just (balance) between those extremes;⁵⁹ i.e. adopt a middle course.
- (iv) They ask thee (O' Muḥammad) how much they are to spend; say : "what is beyond your needs."⁶⁰
- (v) And spend out of what we have provided for them."⁶¹
- (vi) But is righteousness to believe in God and the Last Day, and the Angels, and the Book and the Messengers; (and) to spend of your substance out of love for Him, for your kin, for orphans, for the needy, for the wayfarer, for those who ask and for the ransom of slaves."⁶²

It can easily be concluded from the study of these verses that the Qur'ān lays great emphasis on spending wealth in a proper manner, though

⁵⁷Surah Al-A'raf : 31 :

”كلوا واشربوا ولا تسرفوا“

⁵⁸Surah Al-Asra' : 26 :

”وأت ذى القربى حقه والمسكين وابن السبيل ولا تبذر تبذيرا“

⁵⁹Surah Al-Furqān : 67 :

”والذين اذا انفقوا لم يسرفوا ولم يقتروا وكان بين ذلك قواما“

⁶⁰Surah Al-Baqara : 219 :

”يسئلونك ماذا ينفقون قل العفو“

⁶¹Surah Al-Baqara : 3 :

”وما رزقنهم ينفقون“

⁶²Surah Al-Baqara : 177 :

”وأتى المال على حبه ذوى القربى واليتامى والمساكين وابن السبيل

والسائلين وفي الرقاب“

the same be spent upon oneself. It also draws one's attention to the proper rendering of his duties to others in matters of property and otherwise. Hence, where it urges to spend on others, it assigns the first place to "*Dhawi al-Qurbā*" (the related ones). It is evident that when God forbids an owner from spending lavishly upon himself, how can He approve of doing it upon others.

Now, if the question of gift be examined in the light of the aforesaid directive of the Qur'ān one may arrive at the conclusion that God approves of the gift made, at the first instance, in favour of "*Dhawi al-Qurbā*" (the related ones). And as God Himself is Just, He looks with favour at those who do justice. Keeping this maxim in view when the question of preferential gift is examined it becomes evident that a father and mother ought to observe justice in the matter of making gifts in favour of their issues. If this is not done it shall be in contravention of God's bidding, and those who do not maintain justice, shall belong to the group of the unjust being deprived of any reward in the Hereafter and liable to be penalised there.

Traditions :

The narratives, on the basis of which arguments either for or against preferential gifts have been advanced by the various jurists, are quoted below :—

- (1) 'Āmir says that he heard Nu'mān b. Bashīr saying from the pulpit that his father, Bashīr, made a gift to him. 'Umrah bt. Rawāḥa, thereupon, told him that she would not consent to it unless he gets it witnessed by the Prophet. Hence, he presented himself before the Prophet and said, "I have made a gift to my son born of 'Umrah bt. Rawāḥa. She desires me to get it witnessed, O' prophet, by you. "The prophet asked, "Have you made similar gifts in favour of all your other children". Bashīr said, "No". The prophet said, Fear God ! and maintain justice among your children." Nu'mān said, Hence he (Bashīr) rescinded the gift".⁶³

⁶³ *Al-Bukhārī Ṣaḥīḥ* o. m. *Fath al-Bārī*, Cairo, 1978 A.H. *Kitāb al-Hiba*, Chapter on *Ishḥād*, vol. v, p. 134 :

”عن عامر قال سمعت النعمان بن بشير رضي وهو على المنبر يقول اعطاني ابي عطية فقالت عمرة بنت رواحة لا ارضى حتى تشهد فاتى رسول الله صلى الله عليه وسلم فقال انى اعطيت ابني من عسرة بنت رواحة فامرتنى ان اشهدك يا رسول الله قال اعطيت مائرا ولدك مثل هذا قال لا، قال فاتقوا الله واعدوا بين اولادكم قال فرجع فرد عطية،“

- (2) It is reported by Sa'd Ibn Waqqāṣ that once he was ill in Mecca. The Prophet came to ask after his health. Sa'd did not like to die at the place from where he had migrated. The Prophet said, "God be merciful upon Ibn 'Afrā'." "O, Prophet of God". Sa'd said, "Should I make a will of all my property?" The Prophet replied, "No". He asked, "Of half of my property?" The prophet said "No" He then asked, "Of one-third of my property?" The Prophet said, "Of one-third of your property, but this is also too much. To leave your heirs rich is better than your leaving them in poverty and others maintaining them. Whatever you shall spend that would amount to charity so much so that the morsel that you shall put in your wife's mouth would be so. It is possible, God may grant you long life and a large number of people may draw benefit from you and many others receive injury at your hands." Sa'd at that time had only one daughter.⁶⁴
- (3) It is narrated by Jābir that a person declared to his slave that he would be free after his death. That person had no other property except the said slave. When news of this reached the Prophet, he said: "Who would purchase this slave from me." Na'im Ibn al-Naham, (according to Muslim's narrative Na'im Ibn 'Abdullah) purchased the slave for eight hundred *dirhams* and came to the Prophet with the price. The Prophet handing over the price to the master of the slave said, "Start spending on yourself, whatever is saved, your family shall have a right over it. Whatever still remains other relatives shall have the right over it. If yet there remains something go on spending it your right and your left."⁶⁵

⁶⁴Al-'Aynī : *Umdatul Qārī, Kitāb al-Wasiyyat*, vol. vi, p. 178 :

”عن سعد بن أبي وقاص رضي قال جاءني النبي صلى الله عليه وسلم يعودني وأنا بمكة وهو يكره ان يموت بالارض التي هاجر عنها قال يرحم الله ابن عفرأ قلت يا رسول الله اوصيني بمالي كله قال لا قلت فاشطر قال لا قلت الثلث قال الثلث والثلث كثير انك ان تدع ورثتك اغنياء خير من ان تدعهم عالة يتكففون الناس في ايديهم وانك منها انفق من نفقة فانها صدقة حتى اللقمة ترفعها الي في امراتك وعسى الله ان يرفعك فينتفع بك ناس يضربك آخرون ولم يكن له يومئذ الابنة“

⁶⁵Wali al-Din : *Mishkat*, Karachi, chapter on *I'lāq*, vol. ii, p. 94 :

”عن جابر رضي ان رجلاً من الانصار دبر مملوكاً ولم يكن له مال غيره فبلغ النبي صلى الله عليه وسلم فقال من يشتريه مني فاشتره نعيم بن النحام بشمان مائة درهم متفق عليه وفي
(Contd. on next page)

- (4) Ayyūb Sakhtiyāni narrates from Ibn Sirīn that Sa'd b. 'Ubādah, at the time of his death, divided his property among his children. After his death another child was born to him. 'Umar came to Abū Bakr and said, "The thought of the newly born baby of Sa'd gave me no sleep last night because all his property has already been divided and nothing was left for this child". Abu Bakr said, "By God! my condition has also been the same. Let us go to the child's brother, Qais b. Sa'd." Thus both of them went to Qais b. Sa'd and had a talk with him on the subject. Qais said, "Whatever my father, Sa'd has done, I have no power to undo it. Indeed, I can do this that in your presence as witnesses, I give away my personal share in the property to that child, and herein I give away my share to him."⁶⁶
- (5) "Abdul Razzāq has narrated from Qāsim Ibn Muḥammad that Abū Bakr had told 'Āishah, "My child ! I had made the gift of garden at Kḥaybar and, I think, I had in that gift given you preference over all other children, but you have not taken possession of the same. You would, therefore, return it back to my other children." 'Āishah replied, "O' respected father ! If Kḥaybar with its fruits had turned into gold, I would yet have returned it."⁶⁷
- (6) Muhammad b. Ahmad b. Al-juhaym reported from Mu'awiyah b. Hidah that his father Abu Hidah had 'allati minor sons and

رواية المسلم فاشتره نعيم بن عبدالله العدوي بثمان مائة درهم فجاء بها الى رسول الله صلى الله عليه وسلم فدفعها اليه ثم قال ابدا بنفسك فتصدق عليها فان فضل شئى فلاهلك فان فضل عن اهلك فلذى قرابتك فان فضل عن ذى قرابتك شئى فهكذا فيقول بين يديك وعن يمينك وعن شمالك"

⁶⁶Ibn Ḥazm : *Al-Muhallā*, Cairo, 1352, A.H. vol. vi, p. 174 :

"عن ايوب السخيتياني عن ابن سيرين ان سعد بن عبادة قسم ماله بين بنيه ففى حياته فولد له بعد مامات فلحقى عمر ابا بكر رضى فقال له مانمت الليلة لاجل ابن سعد هذا المولود لم يترك له شئى فقال ابوبكر وانا والله فاطلاق بنا الى قيس بن سعد نكلمه فى اخيه فاتيناه فكلمناه فقال قيس اما شئى اسضاه سعد فلا ارده ابدا ولكن اشهد كما ان نصيبى له"

⁶⁷*Ibid* :

"ومن طرق عبدالرزاق عن ابن جريج اخبرنى ابن ابى مليكة ان القاسم بن محمدا اخبره ان ابا بكر الصديق قال لعائشة ام المؤمنين يا بنية انى نحلتيك نحلًا من خير وانى اخاف ان اكون أثرتك على ولدى وانك لم تكونى احتزتيه فرديه على ولدى فقالت يا ابتاه لو كانت خير بجدادها ذهبًا لرددتها"

Abū Hīdah was a sufficiently rich man. Abu Hīdah gave away all his property to one of his sons. Consequently, his other son, Mu'āwiyah went in the presence of the Caliph 'Uthmān and narrated to him the entire affair. 'Uthmān gave his father the option of either taking back all his property to himself or distribute it justly among all his sons. He, therefore, took back his property and on his death left it as heritable. By that time the brothers of Mu'āwiyah had attained the age of majority.⁶⁸

- (7) On the same authority noted above it is stated that Mujāhid said, "If a person makes a gift of his entire property to one of his sons and deprives others, the entire property, after the donor's death, shall be included in his heritable property."⁶⁹
- (8) 'Abdul Razzāq narrates from 'Urwah Ibn Zubayr, "As the will of a deceased person exceeding the limit is disregarded, so shall be disregarded such a gift of living healthy soul."⁷⁰
- (9) 'Abdul Razzāq has also reported from Zuhayr b. Nāfi' that the latter told 'Ātā Ibn Abi Ribah that he, (Zuhayr) in his gift, wanted to give preference to some of his issues over others. He strongly forbade it and said "treat them all in equal degree."⁷¹
- (10) It is stated through 'Abdul Razzāq from Ibn Jurayj that he asked 'Ātā whether equality would be observed in gift between the

⁶⁸Ibid :

"عن بهز بن حكيم عن ابيه حكيم بن معاوية عن ابيه معاوية بن حدة كان له بنون لعلامة اصاغر ولده وكان له مال كثير فجعله لبنى عملة واحدة فخرج ابنه معاوية حتى قدم على عثمان بن عفان رض فاخبره بذلك فخير عثمان الشيخ بين ان يرد اليه ماله وبين ان يوزعه بينهم فاراد ماله فلما مات تركه الا كابر لاختهم"

⁶⁹Ibid p. 175 :

"عن الحسن بن مسلم عن مجاهد قال : من نحل ولداه نخلا دون بنيه فمات فهو ميراث"

⁷⁰Ibid, 175 :

"عن الزهري عن عروة بن الزبير قال : يرد من حيف الناحل الحي ما يرد من حيف الميت من وصية"

⁷¹Ibid :

"عن زهير بن نافع سالت عطاء بن ابي رباح فقلت اردت ان افضل بعض ولدى في نحل آنحله فقال لا وابي اباؤ أشديدا وقال سو بينهم"

children, the father and wife. He replied, "Tradition of the Prophet has reached me only with respect to the children."⁷²

- (11) Ibn Wahāb states from Nāfi' that Ibn 'Umar in making gift of his property had given preference to some of his children over others in as much as that he had given to one of them three or four slaves. Bukayr quotes Qāsim b. 'Abdul Raḥmān as saying that he (Qāsim) was with Ibn 'Umar. He purchased land from an Ansāri person and said, "This land is reserved for Waqid, the eldest son because he is poor". Accordingly, this land was given in gift to one issue only in preference to the other issues.⁷³
- (12) Similarly Ibn Wahab through Ibn Dinār has reported from 'Abdul Raḥmān Ibn 'Awf that he (Abdul Raḥmān) had given in gift four thousand *dirhams* to his daughter who was born of Umm Kulthūm bt. 'Aqba Ibn Mu'it, inspite of the fact that his other issues from his other wives were present. Further, Ibn Wahāb reports from Muhammad B. Munkadir that the Prophet said, "Every owner of property has more rights over his property."⁷⁴

From the traditions that have been stated above either in support or against the propriety of the preferential gifts, the tradition stated from Nu'mān b. Bashīr has been interpreted both ways, thus both the contending groups of jurists try to prove the correctness of their stand or rule of conduct through the said tradition. (For detailed arguments on these traditions and other reports reference may be had to *Fath al-Bārī* vol. v; *Umaatul Qāri*, vol. vi; *Al-Sunan al-Kubrā* of Bayhaqi, vol. vi and *Al-Muḥallā of Ibn Ḥazam*, vol. vi.)

⁷²Ibid ;

”وبه الى عبدالرزاق عن بن حريج قلت لعطاء : ينحل ولده ايسوى بينهم وبين اب وزوجة قال لم يذكر الا الولد لم اسمع عن النبي صلى الله عليه وسلم غير ذلك“

⁷³Ibid :

”ومن طريق ابن وهب عن ابن لهيعة عن بكير من الاشج عن نافع ان ابن عمر قطع ثلاثة ارفس او اربعة لبعض ولده دون بعض، قال بكير وحدثنى القاسم بن عبد الرحمن انصاري انه كان مع ابن عمر اذا اشترى ارضاً من رجل من الانصار ثم قال له ابن عمر رض: هذه الارض لابني واقد فانه مسكين ينحله اياها دون ولده“

⁷⁴Ibid, p. 176 :

”قال ابن وهب وبلغني عن ابن دينار ان عبدالرحمن بن عوف رض نحل ابنته من ام كلثوم بنت عقبة بن ابي معيط اربعة آلاف درهم وله ولد من غير هاوذ كروا ماروينا من طريق ابن وهب عن سعيد بن ابي ايوب عن بشير بن سعيد عن محمد بن المنكدر رسول الله صلى الله عليه وسلم قال : كل ذي مال احق بماله“

The two groups :

The group which believes in the propriety of preferential gift consists of Thawri, Layth b. Sa'd, Qāsim Ibn 'Abdul Raḥmān, Muḥammad Ibn Munkadir, Abū Hanifah, Qāḍi Abū Yūsuf, Muḥammad Ibn al-Ḥasan al-Shaybāni, and Imām Shāfi'i. And according to a report Imām Aḥmad b. Ḥanbal is also among them. They assert that if a person in full health makes a gift preferring some over others of his children the same may be in *diyānat* (morality, between God and man) abominable, but is legally valid. That is, in the eye of law, the said gift shall be held to be valid and operative. According to them the words of relevant traditions are not commandments or judicial pronouncements ; they are the words of counsel and of general advice.

The other group, in this regard, consists of Tā'us, 'Aṭā Ibn Abi Ribah, Mujāhid, 'Urwah, Ibn Jurayj, Nakḥ'i Sha'bi, Ibn Shabrumah and according to a more authentic report Ibn Ḥanbal, Ishāq b. Rahwayh and Abū Muḥammad Ibn Hazam. According to these persons such gifts are not valid even legally because they comprise injustice and cruelty and courts do not give effect to acts of injustice and cruelty. Hence such gifts shall be invalid (void) and liable to be reversed.

Scholastic Opinions :

According to Ḥanafis, Shāfi'is, Shi'ahs and some of the Mālikis, a Muslim (man or woman) in his lifetime and in health is entitled to make gift of his entire or part of his property to whomsoever he likes. This gift is different from the gift under a will in which a Muslim is not entitled to make gift of more than one-third of his property. However, for a person to make a gift in a manner that one of his issues gets preference over the others is a sin. In other words, a Muslim in his life and health may deprive all his heirs by making a gift of his entire property in favour of a stranger but his action shall not be virtuous though legally valid.

Hanafi View :

Al-Kāṣānī in his famous work, *Badā'i' al-Sanai'* has argued that maintaining equality between the issues shall be the cause of winning their hearts while giving preference to one over the other shall cause dissension between them. Hence maintaining equality between them is the best course. If a person deprives some of his children by giving preference only to some of them, whether those deprived be learned or pious or ignorant and *fōsiq*, his act shall be legally valid because he has full control of his own personal property in which others have *ab initio* no right. But there

shall indeed be no justice done among the children. This is the verdict of the classical jurists.⁷⁵

Muḥammad al-Shaybāni and Abū Yūsuf although in principle agree with Abū Ḥanifah, but there is also an opinion reported from Abū Yūsuf that if a father has made a preferential gift with the intention of harming his other children, the same shall be liable to be set aside.⁷⁶

Abdul Wahāb al-Shī'rānī (of Shāfi'i school) has in his book, "*Kitāb al-Mizān al-Kubrā*", written that there is consensus among the three Imāms (Abū Ḥanifah, Mālik and Shāfi'i) that it is desirable for a father (of howsoever high in degree) to maintain equality between his children in gift made in favour of them. Ahmad b. Hanbal as well agrees in this respect with the three Imāms. According to Muhammad Ibn al-Hasan al-Shaybāni, it is valid for a father to give preference to his male issues over his female issues in accordance with the rule followed in inheritance. The question is: If a father gives preference to one of his children, whether it is incumbent upon him to retract from the preference given? According to each of the three Imāms it is not incumbent.⁷⁷

Malikiyyah :

It is laid down in "*Al-Muwatta*" the authentic book of the Maliki *fiqh* that Tā'ūs, Sufyān Thawri, Ahman b. Ḥanbal, Ishāq b. Rāhwayh, Bukhārī and some Mālikis who are convinced of the incumbency of maintaining justice and equality in the gift made in favour of issues, have mainly argued on the basis of the tradition narrated by Nu'mān Bin Bashir. The preferred opinion of these people is that the preferential gift is void. There is one narrative, however, from Ahmad b. Ḥanbal that such a gift is valid. There is another narrative from him that the preference, if it be due to some special reason, the gift shall be valid. For instance, the issue be a cripple or he be indebted to or suffering from some disease and there be some such cause, (which disables him from earning or be in greater need than others). Abū Yūsuf has said, if the donor in order to harm some of his issues does so, he shall be forced to maintain justice.

⁷⁵Al-Kasānī: op. cit. vol. vi, p. 127.

⁷⁶Al-'Asqalani, Ibn Hajr: *Fath al-Bārī*, Cairo, 1959 A.H., vol. v, p. 134; Al-'Aynī : *Umdatul Qārī*, Cairo, vol. vi, p. 272; Al-Zarqānī : *Sharh Muwatta*, Cairo, 1382 A.H., vol. iv, p. 444.

⁷⁷Al-Shī'rānī, Abd al-Wahab: *Al-Mizān*, Cairo, vol. ii, p. 100; Rahmat al-Ummah fi Ikhtilaf al-Mizān al-Kubra. Cairo, vol. ii, p. 3.

Aimmah, on m. of.

The persons who hold such gifts to be void advance the argument on the basis of Qiyās as well, that utter disregard of relationship responsibilities and disowning of children (‘āqūq) are forbidden. It is incumbent to avoid both. Hence not maintaining justice and equality is the cause of doing what is forbidden, and the act which is the cause of doing what is forbidden is in itself unlawful. Thus, doing justice implies the performance of that which is incumbent and that which initiate the thing which is incumbent is itself incumbent. The maintaining of justice and equality is thus incumbent and its abandonment is forbidden.⁷⁸

Shafi‘is Argument :

The tradition narrated by Nu‘mān Ibn Bashīr is discussed in the book “*Al-Mukhtaṣar*” of the Shafi‘i school. It is said there that Al-Shāfi‘ī too does accept this tradition. It lays down certain rules : One is, the courtesy demand that no preferential treatment ought to be accorded to one over the other of the issues so that in the heart of the one neglected there may not arise a feeling that may lead him astray from the path of virtue because relationship is co-operation of one with another and not enmity or cruelty. The second rule upholds validity of the gift in favour of some of the issues. Had it not been so the Prophet would not have directed the donor to retract from what would be void *ab intio*. The third rule is the validity of father’s retracting from gifts in favour of his issues. Abu Bakr had given preference to his son ‘Āmir. Abdul Rahman b. ‘Awf had given preference to the issues of ‘Umm Kulthūm.⁷⁹

It is written in another noted book, “*Al-Muhazzab*” of Shāfi‘i *fiqh* that Imam Shāfi‘i said, “There shall arise in the heart of one neglected such a feeling from this act that it shall stop him from doing good, besides the cordiality that one relative entertains with another relative shall not be realised due to the injustice. Still the preference, if it is,¹ in fact, given to one over the other, the gift shall be valid, as in the narrative of Nu‘mān b. Bashīr it is also added that the prophet said, “In this gift have someone else as witness besides me”. Had this been not valid the prophet would not have asked someone else to be made a witness.⁸⁰

Hanbali View :

It is written in the book, “*Al-Muḥarrar*” of Ḥanbali *fiqh* that maintaining justice and equality is incumbent in making gift in favour of issues.

⁷⁸Al-Zarqanā: *Sharh Muwatta*, Cairo, 1382 A.H., vol. iv, p. 444.

⁷⁹Al-Muzanī: *Al-Mukhtaṣar*, opp. Kitab al-‘Umm, Cairo, 1381 A.H., p. 134.

⁸⁰Al-Firozābadī, Ibrāhīm b. Yūsuf, Cairo, 1959 A.D., vol. i, p. 453.

Likewise, maintaining justice and equality by following the formula of shares in inheritance in making gifts in favour of other relatives is also incumbent. If, however, a donor dies after choosing one in preference to other in his gift, (the question arises) whether the other heirs shall have the right of getting the gift annulled? For such a case there are two narrations reported from Aḥmad b. Ḥanbal.⁸¹ One is in favour of the proposition and the other is against it.

In another book, "*Al-Iqnā*" of Ḥanbali *fiqh* it is laid down that it is incumbent upon the parents and others to maintain equality in gifts made in favour of those who are their heirs on the basis of relationship, but the same is not necessary in gifts made of insignificant things. The equality maintained shall be in conformity with their heritable shares. Regard shall be had of sufficiency if the gift be that for purposes of maintenance, dress etc. A man, though laid up with death illness, is entitled to distribute his legacy equally with the consent of his other heirs. If a person in his health gets one of his two sons married and pays the dower money on his behalf and thereafter is laid up with death-illness, he, the father, even in that condition, ought to pay the second son as much as he did pay for the first one. In this particular circumstance, the rule of making the will in respect of 1/3 (one-third) of the property shall not apply, as his will in fact is just a device for doing an act which is incumbent and is at par with the payment of a debt. If the person dies before bringing about the equality yet the property gifted shall belong to the donee, provided the gift is not made during his death-illness (because it shall then come under the rules applicable to will).⁸²

Shi'ah View :

It is laid down in the noted book "*Sharā'i' al-Islām*" of Shi'ī *fiqh* that making of gift in favour of relatives is desirable. Specially it is strongly desirable in respect of issues and parents. Likewise, maintaining equality in gift between the issues (holding the shares of sons, daughters or others equal) too is desirable. But in the division of a property giving preference to one issue over the other issues is valid though unapproved.⁸³

Zahiri View :

According to Ibn Ḥasm Al-Zāhiri alms dedicated to pious uses (neglecting the welfare of one's own issues) or gifts in which an issue is given

⁸¹Abul Barkāt, Majid al-Din: *Al-Muḥarrar fil fiqh*, Cairo, 1369 A.H., vol. i, p. 374.

⁸²Al-Maqdisi, Sharf al-Din: *Al-'Iqna'*, Cairo, vol. iii, p. 34.

⁸³Ibn Ḥazm: op: cit., vol. ii, p. 253.

preference over the other issues is forbidden and void. If it is done the Ruler of the time shall hold the same to be void and shall divide it among the issues equally.

It is stated from 'Urwah Ibn Zubayr on the authority of Abdul Razzāq: "As the will (if it exceeds the limit of one-third) of a dead person is annulled, likewise such a gift made by a living healthy person shall be annulled."

It is stated by Ibn Jurayj on the authority of Abdul Razzāq that he (Ibn Jurayj) asked 'Aṭā whether equality could be maintained in gifts between issues, father and wife. He replied, "The tradition of the Prophet has reached me only with respect to sons."

Ibn Hazm quoting the traditions and reports (above mentioned) has written that the practice in this matter of Abū Bakr, 'Umar, Uṭhmān, Qais Ibn Sa'd and 'Ā'ishah during the lifetime of the Companions of the Prophet is on record. No opposition is proved with respect to their practice from any of the other Companions. Besides, there are the Successors of the Companions of the Prophet like Mujāhid, Tā'us, 'Aṭā, 'Urwah and Ibn Jurayj who are all convinced of its correctness. Same is the opinion of Nakḥ'i, Sha'bi, Shurayh, Abdullah b. Shiddād, Ibn al-Had, Ibn Shubrama, Sufyān Thawri, Aḥmad b. Hanbal, Ishāq Bin Rāhwayh, Abū Sulaymān and our other persons. However, Shurayh, Aḥmad and Ishāq differ on the point as to how justice (equality) should be maintained. They assert that the rule of "لِلذَكَرِ مِثْلُ حَظِّ الْأُنثَى" should be adopted. That is to say, the son should get equal to that of two daughters. According to other persons there ought to be exactly equal distribution.

Ibn Hazm says, "Some such narratives have reached us from which it appears that giving preference to some issues over the others is valid as is narrated from Qāsim b. Muḥammad and Rabi'ah and others, of which Abū Hanifah, Mālik, and Shafi'ī are also convinced. But Abū Hanifah (inspite of its validity) calls it detestable and so does Mālik too. These persons, in support of their view, cite the cases dealt by Abū Bakr, 'Umar and 'Ā'ishah".

Ibn Hazm further says, "Except for these narratives I have not been able to find any thing else in their arguments. But those who are not convinced of our rule of conduct (*maslak*) put forward those narratives that Muslim in his "*Ṣaḥīḥ*" quotes on the strength of several authorities. It is a narrative from Nu'mān b. Bashir. He states that his father taking him along presented himself before the Prophet and said, "I have made a gift

⁸⁴Ibn Hazm: op. cit, vol. vi, p. 173-81.

of a slave to this child of mine". The Prophet inquired of him, "Have you likewise made gifts to each of your sons?" He replied, "No, Sir". The Prophet said, "Then retract from this gift." In other versions it is stated that the Prophet annulled it or asked to revoke it. In *Sahih Al-Bukhārī* the words are stated to be "The Prophet said, 'فاتقوا الله واعدلوا بين اولادكم' i.e. "Fear God and act justly among your issues." In *Bukhārī's* version Nu'mān has also said that his father had retracted from the gift. In another version quoted by Muslim in his *Sahih* the words of the Prophet are stated to be "فلا اشهد على جور" i.e. I will not be a witness to cruelty. Thus all the Imāms who have reported this tradition are unanimous on the fact that the Prophet had bidden the donor to annul and withdraw that gift. Some others have also stated that it was withdrawn. The Prophet held such act as cruelty. The act which is held as 'cruelty' in the eye of God (*din*) cannot in practice be held legal. If it is held to be valid then all cruelties shall have to be held as valid and this shall be an open act of demolition of the edifice of Islām." (This hypothesis of Ibn Ḥazm is unsound. A frivolous ṭalāq not warranted by circumstances is an extreme cruelty but perfectly valid. The distinction between legal and moral rectitude will have to be maintained).

Ibn Hazm proceeds, "I have found those who are opposed to me adopting different arguments to rationalise these narratives. Some have said that the father of Nu'mān had made gift of his entire property. I would say, praise be to Allah! it is clear from the tradition that he (Nu'mān) had made gift of some of his property. In some more correct versions the words are, "بعض الموهوبة من ماله" that is, some gift of his property. One group has said that Da'ūd b. Abi Hind in narrating from Sha'bi has stated that the Prophet said to Bashir thus :

"اشهد على هذا غیری اليسرك ان يكونوا اولئك في البر سواغاً، قال بلى، قال فلا اذاً"

In answer to this I would say that these words argue against you and are in my favour; they are not your arguments because the Prophet has clearly said, "فلا اذاً" i.e. it is not (valid) now. From this there is enough prohibition for a wise man. In the saying of the prophet, "اشهد على هذا غیری"

i.e. 'On this covenant make someone else a witness in my place.' If this sentence only (and not the first one) would have been there yet no advantage would have accrued to the other side. Because more eminent narrators than the reporters of these words have quoted the words of the Prophet in which he has decreed the revocation of such gifts and grants and has held such acts to be cruelty and tyranny. The words, "اشهد على هذا غیری" are, in

fact, intimidating words, which are technically called, “wa'id” (dire warning); e.g. God says, “فان شهدوا فلا تشهد معهم” i.e. ‘If they bear witness, do not be witness with them’. This does not prove permission for being a witness to cruelty. Rather the meaning of these words shall be as that of the verse, “فمن شاء فليؤمن ومن شاء فليكفر” i.e. ‘Whoever wishes he may accept faith and whoever wishes he may accept heathenism.’ The meaning of this verse is, “اعملوا ما شئتم” i.e. ‘Whatever your hearts desire do it, and “كلوا وتمتعوا قليلاً انكم مجرمون” i.e. ‘Eat and take advantage for a while, after all you are wrong-doers’. It can in no way be expected from the Prophet that he, for a matter held by him to be tyrannic, shall order for taking any other person as a witness for the act.”

“At this juncture to me there appears to be only two ways that either I call this gift and grant to be correct and valid or to be invalid. Except this there is no third way. If these persons say that it is valid, they will have to say also that the Prophet by refusing to be a witness to a valid matter acted against the bidding of God’s book, “ولا ياب الشهداء اذا ما دعوا” i.e. “The witnesses should not refuse when they are called on (for evidence)” (11:282). and also against, “ولا يضار كاتب ولا شهيد” i.e. and “let neither scribe nor witness suffer harm.” And if they say that the gift, the grant and the alms are void, but inspite of it the cruelty and tyranny has been decreed to be put into effect, it shall be a big calumny to suggest that the Prophet has given an invalid order. For, this would imply decreeing or giving effect to invalid propositions and cruelty and holding the establishing of evidence over it to be correct. Such a belief about the Prophet would be repudiation of faith”. Ibn Haẓm further on writes, “Every group has, adopting a strange path, gone astray in interpreting this particular report. They say, the meaning of Prophet’s statement, “اشهد على هذا غیری” is ‘I am Imām al-Waqt (Spiritual Head); it is not the business of Imām to be a witness (rather his business is to give decisions).’ If this interpretation is held to be correct two calumnies shall necessarily follow : One is the assigning such meanings to the words of the Prophet that could, in fact, never be his intent and meaning. Those who give such a meaning to these words they would deserve their place in Hell. The other calumny is that an Imām may be a witness, as in this matter he (the Imām) is included with other Muslim audience, who have been ordered not to refuse being witnesses. This is the meaning of the directive of God: “كونوا قواسم بالقسط شهداء لله ولو على انفسكم او الوالدين والافرنين” This Qur’anic direction undoubtedly has been applied to the persons in

authority too. In this matter my own view is to the effect that if a higher official appears as a witness before one of his own (subordinate) officials his evidence shall be readily accepted. Thus how could his evidence be accepted if he could not be competent as a witness? Again some persons have interpreted these narratives in such a way that their keeping silent would have been better. It has been said that Nu'mān was probably not a minor and had not taken possession of the gift made to him. Alas! the people who so interpret did not see that Nu'mān was undoubtedly a minor and that unanimously he was born after migration, *hijrat* from Mecca. Abu Hayyān has, in the report of Sha'bi, stated from Nu'man Ibn Bashir himself thus: 'I was at that time a small child'. One group has also said, Nu'man's father had not made the gift; rather he had gone to the Prophet to take his advice on the matter. The narrative of Imām Zuhri, reported from Nu'mān, appears to be concocted. For, the words of his father are reported thus: "انى نعلت ابنى هذا غلاماً فان اذنت لى انى اجيزه اجرته," i. e. I have made the gift of a slave to this son of mine, if you allow I put this into effect." Ibn Hazm says, "What strange people they are? They do not ponder over introductory words of this narrative, nor do they pay attention to the words reported in the middle. It is stated at the beginning, 'نعلنى غلاماً,' yet they say the gift was not completed. However the words, 'If you permit I would maintain it; if you don't I would revoke it' as reported are quite in place. It is the duty of a Muslim to stick to that only which is made permissible for him by the Prophet of God but the permissibility must be so clear that it may require no further interpretation. If the Prophet had held the act of Bashir permissible for him, he, (Bashir) would have acted so; if the Prophet had not held thus, Bashir would not have acted upon it; and that is what happened; the gift was rescinded by Bashir."

Ibn Hazm further states: "This group has narrated one more tradition through Ibn 'Awn. In its text after the words of the Prophet, 'فانى لا اشهد', this sentence also occurs "قاربوا بين ابناكم". Ibn Hazm argues: "This sentence is a strong argument (for us) because this (gift) was void and the Prophet could not be a witness to what was void. Now there remains to be dealt with only the narrative (which has been quoted by the opposite party in its argument, 'كل ذى مال احق يماله' i. e. every holder of property has greater right over his property. This in so far as it goes is quite correct. God has said, 'وما كان لمو من ولا مومنة اذا قضى الله ورسوله امراً ان يكون لهم الخيرة من امرهم' (XXXiii : 36). i. e. it is not fitting for a Believer, man or woman, when a matter is decided by Allah and his Apostle, to have any option about their decision. And has said, 'النبي اولى بالمومنين من انفسهم' i. e. 'the Prophet has

more authority over the Believers than their own selves.' Hence, the law-giver who made Zakāt, a welfare tax compulsory, remuneration of a prostitute unlawful and who forbade the rewarding of a fortune-teller, the wine-seller and the selling of female slave who bore a child to her master ('umm walad), the same law-giver invalidated the making of preferential gifts."

Ibn Hazm has further said, "The opponents who have based their arguments on the reports of the Saḥāba (Companions of the Prophet) and have mutilated them with a view by misrepresenting them, it is enough to say in answer to them that no one's act can be taken as proof as against the act of the Prophet himself. Besides, the tradition respecting Abū Bakr that has already been quoted by us argues against the narrative relied upon by these people. Now remains 'Umar's and 'Uthmān's assertion, *ومن نحل ولده نحل* i. e. "persons who make gift to their issues". This is inapplicable from our point of view, for, we do not forbid making gift. We, however, hold the preference in gift (preferring one over the other) as forbidden. No word of permission for giving preference between the issues occurs in the statement of these persons ('Umar and 'Uthmān), just as no word of licence for the sale of wine and hog occurs in their other statements. There is no difference in the two arguments specially when the prohibition stands proved correctly from these persons as already referred to above.

In the narrative concerning Ibn 'Umar nowhere it is mentioned that at the time of his making gift to Wāqid he had made no gift to other of his issues prior to his making gift to Wāqid or that he made no gift even after that. His saying, "This son of mine is poor" may also mean that prior to making gift to Wāqid he may have already made gifts to his other sons and he (Wāqid) may have been left out; therefore the gift to Wāqid has thus been expressed in kindly words. Besides, one among the reporters of this narrative is Ibn Lahī'ah who is one of the incredible narrators. The narrative of 'Abdul Raḥmān too is not properly traced upto the source." Hence, Ibn Ḥazm maintains that all the arguments of the opposite group stand refuted and the preferential gift so made is void.

Ibn al-Qayyim's Verdict :

Ibn al-Qayyim in his book, "*Zād al-Ma'ād*" writes, "There is authoritative verdict from Aḥmad b. Ḥanbal that the person who intends to offer his entire property in charity, he is allowed to do so with respect to only one-third (1/3) of it. His (Imām Aḥmad's) followers argue (thus) from the incident of Ka'b who said to the Prophet, 'O' Prophet of God! My

remorse (for my past life) before God and his Prophet demands that I give away my entire property in the name of God and his Prophet.' The Prophet said, 'No'. He said, 'Should I then give away half of the property? The Prophet said, 'No' not even this'. Ka'b said, 'Then let me give one-third.' The Prophet replied, "Yes, it matters not". (It will cause no hardship). Ka'b said, 'Very well! I then retain for myself the share (of my property) in Khaybar'.⁸⁵

Hanafi's Refutation :

The Hanafis' argument about Ibn al-Qayyim's ruling based upon the narrative stated above that the gift ought not be of more than one-third (1/3), is that the report can not legally form an argument for holding that the gift of more than one-third is not affective or not valid. The saying of the Prophet to Ka'b that 'one-third does not matter' can not form an argument for a gift, made by a man of his entire property in the name of God and even of others being considered as invalid. Besides, the reports of gift made by Abū Bakr and 'Umar of more than one-third of the property in the name of God are also there. These clearly prove that if making gifts or giving as charity of more than one-third (1/3) had not been valid, the Prophet would not have approved of the said gifts made of more than one-third of the property.

In this view of Hāfiz Ibn al-Qayyim that gifts ought not be of more than one-third of the property the underlying idea appears to be to safeguard the rights of heirs in the property. According to the generality of jurists it is settled that the right of heirs in the property of the deceased is created on the death of the legator and not before it. Hence, putting a limit of one-third in making *gift* tantamounts to not only curbing the right of the donor to the use of his own property in his lifetime, but it contravenes the principle of inheritance as the heir's right of succession opens only on the death of the legator. This embargo may, however, apply in case of will.

Conclusion :

The gift executed during lifetime and completed by the delivery of possession is distinct and different from the gift made through the making of a will. The first is the form of a gift *simpliciter* whereas the second is in the form of a will. Hence, according to Hanafis, through "gift" which is distinct and different from "will" the entire property may be given away. In case of gift there lies no distinction between heirs and non-heirs, relatives and non-relatives, whereas the testator through will can by his act affect the

interest of his heirs in his property to the extent of one-third (1/3) only and no more. The effect of the will comes into play after his death and simultaneously the inheritance opens up in his (the deceased) property.

In other words, a Muslim may, in his lifetime make gift without restriction. It is a different matter that in some cases his act in the eye of God may be held as non-approved or abominable or the Shari'ah may hold it as improper, but juridically his act of gift in respect of entire property shall be considered to be valid. Accordingly, the Court is not empowered to reject a gift merely on the ground of it having been made of more than one-third, or of the entire property, or it having been made in favour of a stranger or heir or in favour of a son giving him more or the entire property in preference to or deprivation of other heirs.

On this basis, it may be said that he is at liberty to throw away his property either in a well or in the sea or on the street. or give it to one or more sons or daughters depriving others. The act may be disapproved morally but it cannot be objected in law. Either the ownership and liberty of contract and obligation and the legal effects of transfer *inter vivos* are there or they are not. No controlled ownership in matter of gift is to be recognised except in case of property held by a *safih* (stupid).

Analysis :

Preferential gift according to most of the classical jurists is quite valid. But this is also correct that such gifts are undesirable to the degree of prohibition.⁸⁶ Indeed there is only a single opinion of Abū Yūsuf among the Hanafis, for its being invalidated if it is made with the intention of causing harm to the donor's other issues. Likewise, there is no harm in depriving the corrupt and immoral children and making gifts in favour of those who are virtuous and learned.⁸⁷

There is one *mursal* tradition reported from the Prophet that clearly proves a person's absolute right to deal with his property. He has said, "Every owner of a property is better entitled to the use of his property".^{87-a}

⁸⁵Ibn Qayyim: *Zād al-Ma'ad* (Urdu Trans.), Karachi, vol. iii, p. 80.

⁸⁶Ibn Nujaym: op. cit., vol. vii, p. 286-87.

⁸⁷Al-Kāsanī: op. cit., vol. vi, p. 127.

^{87a}“كل ذي حق إحق بماله”

It clearly means that the person owning property has greater right of utilising his property. Hence this tradition proves that one, on the basis of the generality of this tradition, may utilise his property in the manner he likes, provided all those utilisations have not been specifically held forbidden under the Shari'at, as the utilisations that have been forbidden under the Shari'at are not included in the generality of this tradition; they are rather the exceptions. Barring the prohibitive injunctions, a person has the right of utilising his property in every manner. It is, however, stated that the Companions of the Prophet in general and the Imams with the exception of Abū Hanifah, Ibrahim Nakḥ'i, and Ibn Sīrīn are convinced of the fact that if any person who is prudent and major, is extravagant and prodigal in the utilizations of his property, the ruling authority (ولى الامر) must place restraint on his utilizations and financial dealings. The two illustrious disciples of Abū Hanifah, Abū Yūsuf and Muḥammad are in agreement with the generality of jurists. According to them it is legal to put a restraint on the improper expenditures of an extravagant and prodigal man. Hence, Ibn Hajr-al 'Asqalāni, quotes the doctrine of these persons and writes thus in the commentary of the verse that "To those weak of understanding make not over your property."^{87-b} "Tabri, in his commentary of the Holy Qur'ān, has said, "According to me the correctness and virtue lies in the fact that the verse gives a general command with respect to people of weak understanding (*Safih*) that they be kept under restraint in the matter of their expenditures whether they be minors, majors, men or women". That person is called "*Safih*" who squanders his property or makes his property the means of creating discord and is not able to utilise his property in a proper manner."

Bukḥārī in his book, '*Al-Saḥīḥ*' has titled a Chapter, "باب ما ينهى عن" "اضاعة المال" that which deals with the prohibition of wasting the property. The meaning of the verse cited by Bukḥārī, is, "O! Shu'aib! Does thy (religion of) prayer, command thee that we leave off the worship which our fathers practised or that we leave off doing we like with our property."^{87-c} The Commentators have said, 'Shu'aib forbade them to adopt vicious methods of dealing with their property. Hence people of his tribe told him that if they liked they would keep their property safe and utilise it in a just

^{87b} "لاتؤتوا السفهاء اموالكم"

^{87c} "اصلاواتك تامرک ان نترک ما یعبد آباؤنا او ان نفعل فی اموالنا ما نشاء"

manner or if they liked they would throw it away (who was he to fetter them?)’.

Ibn Hajr in the comments on the said Chapter further writes, “The dictionary meaning of ‘Hajr’ is ‘Prohibition’. In *Shari‘at* it means ‘Prohibiting the use of property’. Such action is taken sometimes to protect the right of the one who has been restrained (*maḥjūr*) and sometimes the right of the others. The rule of conduct of the majority of jurists is that prohibitory action against a major person is valid. Abū Hanifah and some of the *Zāhiriyyah* have differed from this. Abū Yūsuf and Muḥammad agreed with the majority (that prohibitory action against a major person is valid). Taḥawi has said that he has not been able to find any report from any of the Companions of the Prophet to the effect that according to them prohibitory action against a major person was not valid. Neither could any assertion be found of any of the Successors of the Companions of the Prophet except that of Ibrahim Nakh‘i and that of Ibn Sirin.

In the aforementioned Chapter, Bukḥārī has narrated a tradition from Muḡhīrah. “The Prophet said, “God has made unlawful (*ḥarām*) the disowning of mothers, burying of the daughters alive and not giving to others but himself begging from others; likewise it is considered ill of you to make excessive demand, to be insistent on begging and to waste property”.^{87-d}

Concerning this tradition Ibn Hajr says “the purpose of citing this tradition under this Chapter is that Bukḥārī has already mentioned about the wasting of property in the title of this Chapter. Majority of the ‘*Ulamā*’ have said, ‘in this tradition the ‘wasting’ means ‘spending thriftlessly’ and from Sa‘īd b. Jubayr it is stated that it means ‘expending unlawfully’”⁸⁸.

Bukḥārī has quoted the said tradition in “*Kītāb al-Adab*” too. There the discussion by Ibn Hajr on “Wasting of Property” is sufficiently elaborate. The gist of the discussion is that “the stronger meaning of ‘the wasting of property’ is that the property be spent on matters that are not allowed under *Shari‘at*, whether the character of the need be secular or religious. Men shall be stopped from incurring such expenditure, because

”قال النبي صلى الله عليه وسلم ان الله حرم عليكم عقوق الاسهات وواد البنات ومنع^{87d} وهات وكره لكم قيل وقال وكثرة السؤال واضاعة المال“

⁸⁸Al-‘Asqlānī: op. cit., vol. v, p. 465-66.

God has made the property the means for the amelioration of the condition of his other human beings and by ill-spending the same the purpose is defeated.”⁸⁹

Al-Zamakhsharī in his commentary of the Holy Qur’ān while commenting on “ولا تبذر تبذيراً” has stated that ‘tabzīr’ means disbursing property in an unsuitable manner. It is called squandering. From ‘Abdullāh b. ‘Umar it is reported that spending the property unrightfully is ‘tabzīr’, while Mujāhid states that if a person spends on an unlawful item that too shall be called ‘tabzīr’. A certain person spent too much on a good deed, his companion said that there was no virtue in spending extravagantly. The one spending replied that there could be no extravagance in spending over good deeds. It has been reported from ‘Abdullāh b. ‘Umar that he said : ‘Sa’d was having ablution when the Prophet happened to pass that way. He having seen him performing ablution remarked, ‘O, Sa’d ! Why this extravagance ? Sa’d said, ‘O, Prophet of God ! Can there be extravagance in ablution too ? The Prophet replied, ‘Yes ! even if you be on the bank of running stream’.⁹⁰

Al-Bayḍāwī in his commentary of the Holy Qur’ān too has agreed that some of the commentators say that the verse forbids every one from giving away the fortune bestowed upon him by God in its entirety even to his wife or children and then himself becoming dependent on them. Such men, on account of their considering the property which is the source of the continuity of their livelihood as insignificant, have been called extravagant”.⁹¹

Mufti ‘Abduh in his ‘*Tafsir Al-Manār*, commenting on the verse^{91a} says, “Exceeding the limit in an act is called extravagance (*isrāf*). That is to say, when the act exceeds the limits of justice and expediency. This exceeding in matters of ‘*Shari‘ah*’ is recognised through the principles of the *Shari‘ah*, and in matters of non-*Shari‘ah*, or in matters of such nations who have no *Shari‘ah*, it is known through their intelligence and usages (*‘urf*). The thing that exceeds the limit excites mischief and the real meaning of ‘*isrāf*’ is exciting mischief. The word is derived from ‘*sarfah*’, which is an

⁸⁹ *Ibid*, vol. xiii, p. 10.

⁹⁰ Al-Zamakhsharī: *Al-Kashshāf*, Beirut, vol. ii, p. 661.

⁹¹ Al-Bayḍāwī: *Tafsir Anwar al-Tanzil*, Cairo, vol. i, p. 174.

^{91a} Al-Qur’ān; Surah *Al-Ma‘idah*, v : 32.

insect that eats wood. Whenever extravagance is adopted in a good act the extravagance turns that good act into an evil one. If the entire property is spent even on necessary or desirable objects of maintenance it shall upset one's finances. It can be easily imagined as to what would be the degree (of evil) if the act of extravagance be in respect of undesirable acts".⁹²

It becomes clear from the above discussion that a majority of jurists consider the exceeding of limits even in good acts as sinful and improper to such an extent that they have restrained the persons acting thus. Moreover several instances are proved from traditions to show that the Prophet interdicted acts exceeding the limits although the act itself was the means of their gaining nearness to God. Imam Muslim in his "*Sahih*" reports from Jābir that a person of Banū 'Azra told his slave, 'I give you freedom after my death'. The Prophet asked that person whether he had other properties in addition to that slave. He replied, 'No'. The Prophet sold that slave and Na'im b. 'Abdullah Bin Niham purchased him for eight hundred *dihrams*. Making over the sum to the owner, the Prophet said, "First spend from this sum on yourself. Whatever there remains after that spend it on your family. If something still is left over spend it on other relatives. And if still more is left spend it by giving it in alms here and there".⁹³

In a tradition from Maḥmud b. Labid it is stated that a person having with him a gold piece of the size of an egg presented himself before the Prophet and said, "O' Prophet of God! this is my entire property. I have nothing except this. I give it in charity". The Prophet taking it in his hand flung it with such force that had the man been hit by it he would have been greatly hurt, and said, "One of you taking his entire property comes up and (giving it all in charity) makes himself a burden upon others."⁹⁴

In short, the Companions of the holy Prophet (Siḥābah), the Successors of the Companions (Tabi'ūn), later Imams and jurists have considered it advisable to put restraint on acts of expenditure of a major prodigal

⁹²Mufti Abduh: *Tafsir al-Manār*, Cairo, vol. iii, p. 351.

⁹³Al-Muslim: *Saḥīḥ*, Cairo, (with commentary by Al-Nawawī), vol. vii, p. 83.

⁹⁴Ibn Ḥazm: op. cit., vol. vi, p. 168.

person exceeding the limits and held the same to be quite in conformity with the purpose of Islamic *Shari'at*. Applying this principle to the points at issue before us, it can be said that a person's utilization of his personal property shall be correct to the extent that it does not put his own and of his dependants' welfare in hazard. If it exceeds that it shall be unacceptable.

Shaltut's Verdict :

In the question of preferential gift late Allamah Mahmūd Al-Shaltūt of Egypt giving his verdict against it in very strong terms in his book, "*Fatā'wa al-Shaltūt*"⁹⁵ writes, "The law relating to a person of weak understanding who wastes his property or expends the same on such objects which are not of any worth in the eye of *Shari'ah*, is that he shall be stopped from expending his property. Likewise it is legal, for protecting the rights of a creditor, to stop a debtor from expending his property. Hence, my creed is that it is nearer to God's will to put a stop to the act of such ancestors who involve their progeny into mischief or deplete their family finances or by depriving some of the family members upset the family's natural balance of collective life or without reasonable cause give preference to some of the family members over the others".

Al-Shaltūt, advising general Muslims to fear God and to deal out justice among their dependents, has at the end addressed the law-framers (individuals or institutions) in these words :

"O 'Framers of Laws ! you have been appointed to protect the people of 'Ummah, protect them and frame laws that are wise and equitable and free from interference by the mischief-mongers and refractors. We implore God that He may grant life and strength to the 'Ummah and safeguard their aspirations and honour".

Pakistan Rulings :

B.Z. Kaikaus and Akhlaque Hussain, JJ. in the case of *Shafiullah vs. Ghulam Jabbar* (P.L.D. 1955 Lahore P. 191), held that "the only restraint upon a Muslim in the matter of alienating his property imposed by the Muslim Law relates to wills and gifts on death-bed. In other cases, the power of alienation of a Muslim *qua* his property is, apart from the

⁹⁵Al-Shaykh Maḥmūd Al-Shaltut: *Fatawa*, Cairo, p. 338-41.

conditions laid down by the law for completing a transfer, is unfettered. Gift in favour of some heirs to the exclusion of others is valid. It may be impious for a Muslim to deprive some or all of his children of his property by alienating it in his lifetime and it would be obviously so in all good sense if done without just cause, but there is nothing anywhere in the Holy Qur'ān to forbid such gifts when made by a person not suffering from *marz al-maut*".

The learned Judges in their decision have differed from an earlier decision of Peshawar High Court in the case of *Sardar Ahmad vs. Shohrat Khan*, (P.L.D. 1950, Peshawar p. 45), wherein such a gift had been held to be invalid. In that case the learned Judge had observed, "An intelligent study of the Muslim Law regarding the testamentary disposition possessed by a Muslim will show that it is the policy of the Muslim jurists to prevent any interference with the course of devolution of property amongst the testator's heirs as laid down in the Holy Qur'ān. The law would be the same if a certain transaction, though on the face of it a gift is, in fact, a device to deprive a lawful heir of his share in the property. No person can be permitted to defeat the object of Muslim Law by entering into such colourable transactions. It is an admitted principle of law that a gift intended to defeat or defraud the creditor is voidable. On the same principle a gift intended to disinherit an heir would be a sham transaction, and, therefore, nugatory. The gift in order to be effective should be a genuine transaction and not merely a plan to achieve some ulterior object: It is true that the necessary effect of almost all the gifts will be disinheritance of one or the other of the heirs of the donors, but then it should be the effect and not the real object of the gift. If the real object of the gift is disinheritance of an heir, it will be, in my opinion, bad in law".

Power of donor : In a Karachi case, *Fakhruddin G. Ebrahim J.*, observed that a Musalman during his lifetime has unfettered power to deal with his properties as he may deem fit. He may, for example, make a gift of his entire estate and he may, either by design or otherwise, exclude thereby all or any of his heirs. If, therefore a Musalman instead of a gift makes an effective declaration of trust of his property the consequences can be no different. (PLD 1975 Karachi 979 at p. 1002, Ref. *Saifullah vs. Ghulam Jabbar* and others PLD 1955 Lah. 191 and 1919 IC 522).

Motive of gift : A gift in order to be effective should be a genuine transaction and not merely a plan to achieve some ulterior object. Thus

where the gift is made with the object of disinheriting some of the heirs, it will be invalid. (PLD 1950 Pesh. 45.) But this does not mean that all gifts which result in the disinheritance of some heirs are invalid. (PLD 1955 Lah. 181; PLR 1955 Lah. 57). A gift is invalid only where the disinheritance is the object but not merely the result of the gift. (PLD 1950 Pesh. 45).

Gift to defraud the creditors: When a gift is made with intent to defraud the creditors of the donor it is voidable at the option of the creditors but it is wrong to attribute the intention of defrauding the creditors to a certain person simply because when he executed the gift deed he owed some money to one or different individuals. The person challenging the gift deed on account of that fact must bring some more material on the record to prove the guilty intention of the donor besides the fact that he was under debt at that time. (PLD 1950 Pesh. 45).

Certainly the Peshawar view is better expressed and to the point wherein the motive to deprive an heir or creditor is quite obvious. The Lahore and Karachi views are too general and do not even passingly refer to the possibility of the transaction of *hiba* being patently mala fide. I suppose, the true interpretation of the law would be to make allowance in the application of the doctrine of absolute ownership, for the application also of the rule nullifying transactions amounting to "fraud on the statute". The gift, therefore, if made mala fide with a motive to defraud creditors, whether preferential or not should be held as voidable; but in so far as it is not so and preferential gift is made in favour of one son or daughter or any other relative or even a stranger as against the other heirs, it would be valid, though sinful in some cases. Once the principle of absolute ownership is recognized, it would be in consonance with the principle to hold such gift falling within the competence of the donor and as such valid, unless the donor at the time of making gift is proved to be *safih* (stupid).

Note : The present writer in his *Majmu'ah Qawanin-i-Islam*, 1973, vol. iii, p. 992 has expressed on this point a different view, which now stands altered.

Section 193. (1) Gift of property made for life of the donee is
 Gift for lifetime valid.

(2) If a person makes a gift of property to another for the latter's lifetime, with the condition that it shall after his death devolve upon the donor, or in case of the donor's

death on his heirs, the property shall validly vest in the donee and the condition so attached shall be void.

COMMENTARY

The word of '*Umrā*' is in the nature of the word 'Gift', because this word too means 'making one person as owner by means of gift'. Gift for life in the terminology of *fiqh* is called "*Umrā*". In *Shari'ah* 'Gift for life' is valid.⁹⁶

'*Umrā* is that kind of gift in which a person makes a gift of a property with the condition that the donee shall remain its owner till his lifetime. After his death it shall return back to the donor. Such a gift under Islamic Law shall be valid. After the death of the donee, however, the ownership of the property shall not return back to the donor, and the heirs of the donee shall be entitled to it.

In *Hidāyah* it is said that if a person makes a gift to another person with the condition that on his death the property given in gift shall return back to the donor, the gift shall be valid and the condition would become void.⁹⁷

The basis of this principle is the tradition that has been narrated from the Prophet, viz. that he held '*Umrā* to be valid and the condition of the gift property returning back to the donor after the death of the donee, to be void.

Obviously this rule of law is founded on the principle of *Istihsān* viz. that the donee ought to get complete right in and perfect power over the property given to him in gift and any condition restricting his complete rights over the property or his power of dealing with the property should be held to be void. The legal effect of such a gift would be that the person in whose favour the 'gift for life' is made would become the perfect owner of the property given in gift.

Precedents from Traditions :

Several narratives from the Prophet are reported by Al-Muslim in his *Ṣaḥīḥ* in connection with gift of property for life. Thus it is reported of

⁹⁶Al-Qudūrī: op. cit., p. 130; 'Abd Allah b. Mahmūd b. Mawdūd: *Al-Ikhtiyar le ta'lil Al-Mukhtar*, Cairo, 151, vol. iii, p. 53.

⁹⁷Al-Marghinānī: op. cit., vol. iii, pt 292; Abd Allah b. Mahmūd b. Maudud: op. cit., vol. iii, p. 53; Damad Āffandī: op. cit., vol. ii, p. 366.

Jābir b. 'Abdullah that he stated that the Prophet said, "If a property is given in gift to a man for his lifetime it shall become his property and it shall not return back to the donor (after his death)".

Al-Muslim has stated another narrative also from Jābir. "A woman in Medina gave a garden to his son as a gift for life. The son thereafter died leaving behind certain issues. The woman also then died. She left behind her some issues and a brother. The issues of the woman said that the garden devolved upon them (by inheritance) and the son's issues said that the garden belonged to their father during his life as well as thereafter. Both the parties took their dispute to Ṭāriq, the freed slave of the Caliph 'Uthmān. He sent for Jābir, who bore testimony to the statement of the Prophet. Ṭāriq thereafter wrote to 'Abdul Malik b. Marwān. Therein he also mentioned about the testimony of Jābir. Abdul Malik said, "Jābir has spoken truly." Ṭāriq thereupon issued his orders and the garden continued to be in possession of the issues of that son".⁹⁸

Shi'ah View :

Najmuddin Abū Ja'far Al-Hilli in his noted work, *Sharā'i' al-Islam* has written that making a gift to someone of a residential house is a contract that requires proposal, acceptance and transfer of possession. It is thereby intended to establish someone as an owner for the realisation of usufruct with permanence of ownership over the property. It (such gift) has different (technical) names varying with the objective it relates to. When it relates to (a period) 'Lifetime' ('Umr in Arabic) it is called 'Umrā. When it refers to 'Residence' the provision for living in a house it is called "Suknā". When it refers to a period of time it is called "Raqbā" as the word "Raqbā" is derived from "irtiqāb", which means 'waiting'. As in such a contract the "appointed time" has to be waited for, it is called "Raqbā". And "Raqbā" concerning the property means 'Control over property'. If an owner of a house, for the benefit of a donee, makes a gift of the house to him for an appointed time it may rightly be called "Raqbā". The contents of this contract are "I have given you this house or this land by way of gift for life, 'Umrā or by way of Raqba, till the appointed period. The contract becomes binding by the making over possession of the property. If the donor has said, "You have the right of residing in this house till your life", it shall be valid. And the right of residence after the death of the resident

⁹⁸Al-Muslim: *Saḥīḥ*, (with commentary by Nawawī), Cairo, vol. xi, p. 69-72.

shall return back undoubtedly to the donor of the right of residence. But the one if says, "You have the right of living in this house for your lifetime but it shall return back to me after your death" it shall, of certain, return back to him; and if he says "I said about the house (that it is) for you and for your descendents for life ('*Umrā*'), it shall be for life and as long as the donee's descendents are living they have the right to live therein. After the descendent's line terminates, it (the house) shall revert back to the original owner. When the house is given for a fixed period it becomes final by making over its possession; and the one who gives the right of residence has no right to revoke it prior to the fixed period being over. If the right of residence is given till the life of the owner, on the death of the person to whom the right is given, it shall not return back to the owner; it would continue to be held till the lifetime of the owner, by the heirs of the deceased. If the right of residence is fixed with the life of the one to whom the right of residence is given and he dies, the right shall not devolve upon the heirs; it shall rather revert back to the owner. If some period is not fixed for residence, the owner has at all times the right of cancelling it. What can validly be endowed can also be given validly in gift for life, as houses, estate, goods, etc. Sale does not annul the contract of gift for life. Rather the purchaser has to abide by the terms entered into for the house. (Hence, in case of sale the owner is bound to come to terms with the purchaser abiding by the conditions made for residence in the said house till the period fixed). The right of residence applies only to the donee who actually resides and to his family members. The residence of any one else therein besides the donee and his family members shall not be valid except when there is some provision to this effect. Similarly, it is not valid for the one living therein to give the said (right of) residence on lease.⁹⁹

Pakistan Rulings :

Corpus of property gifted to one person, usufruct may be gifted to another for limited period : The donor may give the corpus of property with possession to one person and its usufruct to another for a limited period. If a donor makes a gift of the corpus and delivers possession to the donee "A", but makes a condition that the income or a part of it shall be given to another person "B", during his lifetime, the gift and conditions are both valid. [PLD 1969 Lah. 338 – PLR (2) W. P. 671 (DB.)]

⁹⁹Al-Hili: op. cit., vol. ii, p. 252;

Gift of usufruct of property for limited period : Where corpus of the property is transferred for life time and the conditions are attached thereto, the gift is valid but the conditions are void. However, where the intention of the maker of the gift is to transfer the usufruct of the property then in that case a limited interest is created for a particular time and, therefore, conditions can be attached to it such as the reversion of the property to the donor after the expiry of the limited period. [PLD 1969 Lah. 338—PLR 1969 (2) W. P. 671 (DB).]

If the donor transfers the property to the donee and does not retain any dominion over the corpus, a condition that a whole or part of the usufruct would be paid to the donor or would be in his use during his lifetime would be valid. [PLD 1969 Lah. 338—PLD 1969 (2) W. P. 671 (DB).]

Gift of corpus of property with condition : The corpus of the land in dispute was gifted away by the appellant to the respondent; that the gift of the land was that of corpus of the land and that the condition attached to it, being only for life of the donee or till her remarriage, was void; and that the gift would continue to operate without the said condition. (PLD 1970 Lah. 502).

Gift creating life estate in usufruct : A limited estate or interest in immovables is contrary to the very conception of the Muslim Law of property (as also of the Muslim approach to various other matters). While disposing powers have been given to a Muslim owner and he can also dispose of his entire property by a gift inter vivos, his testamentary powers do not exceed one-third. A life-estate may affect more than one-third of the donor's property after the latter's death. It is quite understandable that a donor may bind himself for life, but there is no power vested in him to bind his heirs by a gift, the operation of which may extend beyond the donor's death. [PLD 1972 Pesh. 37 (DB).]

Gift of corpus and gift of usufruct : *Tamliknama* reciting that property was gifted to T on her agreeing to marry S and living with him as his wife and further declaring that the donor and his heirs were completely divested of any right whatsoever in the gifted property—Gift deed, however, further reciting that T would not sell or mortgage property during her lifetime and that on death of T property would devolve upon her husband S and her children born out of the wedlock with S—Gift in circumstance, held one of the corpus and not merely the usufruct—Condition contained in *Tamliknama* regarding transfer and mortgage during T's lifetime being in defeasance of her rights under gift was void and gift was effective as if no conditions were attached. (*Syed Akber and others vs. Mst. Kakai* PLD 1975 S.C. Pp. 377, 378).

Gift of usufruct of property : A gift of usufruct for life with a condition that after the death of the donee the property would revert to the donor or his heir or legal representatives is valid. The creation of life interest is nothing more than a lease, of a certain property, which is to subsist for the lifetime of the lessee, in such a case the owner does not part with the corpus of the property, but he only grants to another its use and occupation for a specific period, which cannot on any ground be made subject to any legal objection. If, however a person gifted away the corpus of certain property in favour of another person but attached a restriction thereto, that the donee would not be able to alienate it in any way, the restriction would be bad in law and the gift shall operate without the restriction. (PLD 1972 Pesh. 77—PLD 1953 Pesh. 1). The distinction between an 'Umrā, and a gift of usufruct with a condition lies in the fact that an 'Umrā, is an absolute gift with a condition attached to it, whereas a gift of the usufruct is not an absolute gift and does not affect the corpus of the property. Therefore a condition attached to it cannot be disregarded. Thus, if a person granted the lease of certain property in favour of his four daughters, and that lease was to subsist till the lifetime of these four girls it could not be said that the lease was against any law even though its consideration was natural love and affection, which is permissible under Section 25 of the Contract Act. Therefore such gift is valid and the condition attached to it cannot be disregarded (PLD 1953 Pesh. 1). Where A made a gift of land to his second wife W on the condition that she should enjoy the property for life, but on her death the gifted property would either revert to K or his heirs. On her death her heirs claimed that the condition attached to the gift was invalid and W took the property absolutely, it was held that the gift was only of the enjoyment of the property, and therefore condition attached to it could not be disregarded. The land reverted to the heirs of 'K'. (PLD 1956 Dacca 143).

Gift of usufruct is revocable : A gift of usufruct is known in Muslim Law as 'āriyat and while hiba is revocable only in particular cases, an 'āriyat is by its nature revocable. (PLD 1958 Lahore 198).

Vested remainder or left over : The gift of a vested remainder, or left over is not valid under any of the schools of Muslim Law (PLD 1948 P.C. 23). Muslim Law admits only ownership unlimited in duration. Over the corpus of the property the law recognises only absolute dominion, heritable, and unrestricted in point of time; and where gift of the corpus seeks to impose a condition inconsistent with such absolute dominion the condition is rejected as repugnant. (PLD 1948 P.C. 23.)

Section 194. Contingent gift on the death of the donor or donee is invalid.

COMMENTARY

The word "*Raqbā*" is derived from "*Muqārabat*". The meaning of "*Hiba Raqbā*" is that if a person says, 'If I die before you this property is for you and if you die before me this property is for me'. In such events each remains expectant of the death of the other.

According to Abū Hanifah and Muḥammad al-Shaybānī, such gift (*hiba Raqba*) is invalid and falls under the category of '*ariyat*', a licence (revocable at any moment). According to Abū Yūsuf such 'contingent gift' is valid.¹⁰⁰ The final verdict, however, is in accord with the opinion of Abū Hanifah and Muhammad; hence such a gift shall be invalid.

According to the Zāhiriyyah, gift for life ('*umrā*) and the contingent gift (*Raqbā*) both are valid and perfect and all the conditions set up therein by the makers of 'gift for life' or contingent gift' shall be void. The property given in gift shall be the property of the donee and the same shall be included in his heritable estate.¹⁰¹ The Shi'ah point of view has already been stated under Section 193 *supra*.

Section 195. When a gift is made for consideration it shall be called *hiba bil 'iwaḍ* which shall be valid and operative on the receipt of consideration ('*iwaḍ*).

Hiba bil 'iwaḍ
(gift for consideration)

COMMENTARY

If gift is made for consideration getting possession over both the exchanged properties is essential. After getting in such possessions only, the gift shall be valid. *Hiba bil 'iwaḍ* falls in the category of sale. Hence, it may be repudiated on the ground of exercising the option of inspection thereof (*Khayār al-Rūyat*) and the option of discovering defect therein (*Khayār bil 'ayb* or in case of an option after inspection).¹⁰²

Hiba bil 'iwaḍ is a 'gift with consideration'. It is in reality a sale and has all the ingredients of a contract of sale. Hence, making over possession

¹⁰⁰Al-Qudūri: *Al-Mukhtaṣar*, op. cit., p. 130.

¹⁰¹Ibid.

¹⁰²Al-Marghīnānī: op. cit., vol. iii, p. 29; Ibn Nujaym: op. cit., vol. vii, p. 295; Ibn Ḥazm: opp. cit., vol. vi, p. 102.

is not a condition to make it perfect as is necessary in case of a simple gift. Moreover, an undivided share (*Mushā'*) in property capable of division may also be lawfully transferred through *hiba bil 'iwad*. For the validity and completeness of *hiba bil 'iwad*, however, the following two conditions must be present :

- (1) Actual passing of the consideration (*'iwad*) on behalf of the donee,
- (2) Donor's divesting himself, with bonafide intention, of the property at once and declaring the conferring of it upon the donee.

The adequacy of consideration in exchange is not essential, whatever its value may be. However, possession or payment, as the case may be, actually and bonafide should be made over by the parties.

A person makes a gift of five *dirhams* and some clothes to another person. The donee takes possession of both of them. Thereafter the donee, from this gift, makes a back gift of either the clothes or the dirhams to the donor. It shall not be considered exchange or consideration (*'iwad*).¹⁰³

If two different contracts are concluded in one or two sittings and the one may have been in consideration for the other, then according to the rule of *Qiyās* they may be held to be in consideration for each other.¹⁰⁴

If the donee gives something to the donor and does not specify that it is in exchange for the gift made by the donor, it shall not be 'gift for consideration' and the donor shall, in accordance with the provisions of Section 200, be entitled to revoke his gift.

Pakistan Rulings :

The Dacca High Court in the case of '*Shamsunnisa Bibi vs. Abdul Ghafoor*'¹⁰⁵ has held that "*Hiba ba Shartul 'iwad* is a gift made with a stipulation for return. In this form of *hiba*, too, there are two separate acts of donation, but the main distinction between *hiba bil 'iwad* and *hiba ba-shartul-'iwaz* is that in the former the '*iwaz* is voluntarily offered by the donee after the completion of primary gift, while in the latter the '*iwad* is expressly stipulated for between the parties at the time of the primary gift.

¹⁰³Al-Sarakhsī: op. cit., vol. xii, p. 81; Ibn Nujaym: op. cit., vol. vii, p. 292.

¹⁰⁴Al-Sarakhsī: op. cit., vol. xii, p. 81.

¹⁰⁵PLD 1964, Dacca 451.

In order to be valid, every form of *hiba* under the Muhammadan Law, whether it is a *hiba* simple, a *hiba bil 'iwaq* or a *hiba ba-shartul-'iwaq*, must contain the following essential elements, namely :

- (i) A declaration by the donor intending to transfer in present to the donee the subject-matter of the gift.
- (ii) Acceptance of the gift by or on behalf of the donee.
- (iii) Delivery of possession of the subject-matter of the gift by the donor to the donee.

Acceptance of the gift may be express or implied, and delivery of possession may be actual or constructive according to the circumstances of the case, but no transaction which does not contain the above essential elements can be treated as *hiba* or a variation thereof under the Muhammadan Law."

The learned judges in the above noted case holding that *Hiba bil 'iwaq* in Pakistan is not governed by the rules of Islamic Shari'at and it is rather governed by the general law of the country, observed that "The clear distinction between a *hiba* and a *hiba ba-'iwaz*, for a consideration under the Muhammadan Law, as pointed out earlier, is to be borne in mind in determining the real character of such transactions. In view of the distinction between them, *hiba ba-'iwaz* for a consideration is to be treated as a sale and is governed by the general law relating to transfer of property and not by the rules of Muhammadan Law relating to *hiba*. Accordingly, delivery of possession of the subject-matter of such a *hiba bil 'iwaq* is not necessary to complete the transfer; what, however, are necessary to make the transaction valid are an actual payment of the consideration on the part of the donee, and a bonafide intention on the part of the donor to divest himself *in presenti* of the property and to confer it upon the donee. It is immaterial if the consideration is inadequate or of notional value."

In another case of the Dacca High Court it was held that a gift made in favour of one's own wife in lieu of her dower is a *hiba bil-'iwaz* and delivery of possession is no condition.¹⁰⁶

Mr. Justice Kaikaus in the case of "*Fazal Ahmad vs. Rakhi*" reported in P.L.D. 1958, Lahore page 218 held that making over possession in *Hiba bil 'iwaq* is essential. He held, "*A hiba bil 'iwaz* of Muslim Law

¹⁰⁶PLD 1955, Dacca, 39.

simply consists of two simple gifts, the only additional factor being that the first gift actually forms a consideration for the second. In a *hiba bil-'iwaz*, the second gift is not, at the time when the first gift is made, in contemplation at all, that is, there is no condition attached to the first gift that the second gift is to be made. The second donor is at liberty to make or not to make a gift. The first gift has, therefore, to be completed by delivery of possession. The second gift too is an ordinary simple gift, with only this distinguishing factor that the first gift furnishes the reason for it. In fact, there was no need to place the *hiba bil-'iwaz* in a separate category at all, were it not for the fact that the revocability of a gift is affected once the donee has also made a gift in consideration for it, and the first donor has accepted the second gift. Having accepted the second gift he is debarred from repudiating his own gift. When he is debarred the donor of the second gift is for a similar reason also debarred.....". The learned judge further, observed. "So far as *hiba ba-shartul-iwaz* is concerned, it is till its completion, a gift. On completion only it becomes a sale and, therefore, the Muslim Law would apply to it till it has been completed..... That to both *hiba bil-'iwaz* (as I describe it) and *hiba ba-shartul-'iwaz*, the rule as to delivery of possession is applicable, is a matter on which there is no difference of opinion. In both of them delivery of possession is essential. The case of *hiba bil-'iwaz* is simple enough, for it consists of two independent simple gifts. As regards *hiba ba-shartul-'iwaz*, I have already quoted from *hidayah* where seizin is regarded necessary. The rule of necessity of delivery of possession cannot be excluded by the transaction being a *hiba bil-'iwaz*."¹⁰⁷ In case of '*Hiba bil-'iwaz* the gift shall be invalid on the ground of there being no consideration.¹⁰⁸

Gift made in lieu of services :

If the services rendered by the donee have monetary value and a gift is made in lieu of such services it shall be *Hiba bil-'iwaz* because in this case there is an exchange of value for value. If the services rendered be such that have no monetary value their mentioning in the deed of gift can only be the motive not the consideration for the gift. The gift, in that event, shall be a simple gift, not *Hiba bil-'iwaz*. The explanation of section 25 of the Contract Act fully applies to such a case and the gift shall completely be valid though there may not be any consideration disclosed therein. Thus, Mr. Justice Waheeduddin Ahmad in the case of *Bahadur vs.*

¹⁰⁷PLD 1958, Lah., 218.

¹⁰⁸PLD 1958, Dacca, 198.

Jan Muhammad (P. L. D. 1960 Karachi, 745) has held : "A gift in consideration of services rendered by a person is not in the nature of *hiba bil-'iwaz* or *hiba ba-shartul-'iwaz*, because there is no exchange of any property between the donor and the donee. The donor gifts the property in appreciation of the services rendered by the donee. Merely because the services rendered by the donee can be converted into money value, it does not follow that the donee has given it in exchange to the donor. Services are either rendered in the past or in future and there is no immediate transfer of any property from the side of the donee to the donor,"

Hiba bil-'iwaz in India and Pakistan :

M. Justice A. R. Changez in the case of "*Bhagni vs. Manzoor Husain Shah* (P.L.D. 1957, Lahore, 574) held that: "In true *Hiba bil-'iwaz* there are two distinct and independent acts : firstly, the original gift, and secondly, the reciprocal gift by the first donee in *'iwaz* or exchange. This reciprocal gift by the first donee is *'iwaz* or exchange. This reciprocal gift by the first donee is called true *hiba bil-'iwaz*. But in the so called *hiba bil-'iwaz* of Indo-Pakistan sub-continent there is only one act, the *'iwaz* or exchange being involved in the contract of gift as its direct consideration, and this in reality is not a proper *hiba bil-'iwaz*, but is a sale or exchange, as the case may be, and has all the incident of these contracts. If the services rendered by the donee have a monetary value and in exchange of such services a gift is made, then the transaction is *hiba bil-'iwaz*, because in that case it is an exchange of property for property. But when such services do not possess any monetary value and the recital in the deed of gift in respect of the services is only a motive for making the gift and is not a consideration for the gift, the gift is a pure gift and not a *hiba bil-'iwaz*. Explanation 1 to section 25 of the Contract Act is fully applicable and the gift is perfectly valid even if there was no consideration for it."

Ordinarily in a transfer of immovable property by a Muslim husband to his wife in lieu of dower, there are two distinct gifts, one by each party to the other. The husband transfers by gift the property, while the wife makes the gift of her right to recover dower. In other words she makes a gift of the dower debt. The transaction is essentially *hiba-bil-'iwaz*. This being the ordinary rule it need to be observed that there might be some exception, as visualised in some cases depending upon peculiar circumstances thereof.

A transfer by a Muslim husband in favour of his wife in lieu of her dower being essentially a gift, is not required to be effected through a registered instrument,

Further the provisions contained in Chapter VII of the Transfer of Property Act which *inter alia* required making of a gift of immovable property only by registered instrument, do not apply to the cases of *hiba-bil-iwaz* by a Muslim. Such gifts are excluded by virtue of Section 129, which provides that nothing in Chapter VII shall be deemed to affect any rule of Muslim Law. (*Muhammad Afzal Zullah vs. Allah Jawai P.L.D.* 1975 Lahore 1399 at pp. 1403-4).

Revocation of hiba bil-'iwaz :

When the donee has given away the exchange of the gift to the donor and the donee has taken possession of the same it shall not be valid for the donor to revoke his gift nor shall it be valid for the giver of the consideration (donee) to revoke his exchange.¹⁰⁹

It is all the same whether the return for the gift is less or more or is not of the same kind as that of the gift.^{109a}

If a Christian makes a gift in favour of a Muslim and the Muslim in its exchange gives him wine or a swine it shall not be said to be 'exchange'. A father makes a gift from the property of his minor son and the donee gives something in return, this '*Ta'wīq al-Hiba*' is void. Likewise, a person makes a gift and the father gives its return from the property of his minor son the same shall not be valid.¹¹⁰

If two different contracts of marriage are made either in one sitting or in two sittings and one of the marriage contracts be made the exchange of the other, then according to Ḥanafis this, on the basis of Qiyās, shall be 'exchange'. According to Imam Abu Yusuf, it shall not be the 'exchange' (consideration).¹¹¹ In fact, the marriages being legal, proper dower shall be incumbent on the husband. (For details see *Nikāh al-Shighār* Exchange Marriages vol. 1, p. 178 of this Code.)

When a donee makes a gift of something in favour of his donor and does not say that it is in exchange of his gift, the donor shall have the right of revoking his own gift,¹¹² provided the conditions permitted by the Shari'ah are available.

¹⁰⁹Al-Sarakhsi: op. cit., vol. xii, p. 75-82; Ibn Nujaym: op. cit., vol. vii, p. 292.

^{109a}Ibid.

¹¹⁰Ibid.

¹¹¹Ibid.

¹¹²Ibid, Damād Āfandī: op. cit., vol. ii, p. 362; 'Abd Allah b. Mahmūd b. Mawdūd, op. cit., vol. ii, p. 53.

Section 196. A gift made with the condition of a return shall be called 'gift with condition of exchange'; such a gift shall be effective on the fulfilment of the condition.

COMMENTARY

In 'gift with condition of a return', the condition becomes binding upon the parties. Initially its characteristics are that of a gift but when the donee takes possession of the gift property and the donor takes possession of the 'exchange', it assumes all the characteristics of 'sale'.

Making over of possession is as necessary in 'gift with condition of exchange', as it is in a 'simple gift'. It may be annulled as well; but when the 'exchange' is made over to the donee the gift becomes incapable of being annulled.

In Indo-Pak sub-continent it is not customary to make a 'gift with condition of a return'; rather most of the instances are that of 'gift for consideration'. The basic difference between 'gift with exchange' (*Hiba bil 'iwaq*) and 'gift with condition of exchange' (*hiba ba-shartul-'iwaq*) is that in 'gift with consideration' the exchange that the donee gives is at his own volition whereas a 'gift with condition of exchange' is a contract with details of exchange as agreed between the parties.

In view of the above stated difference there are two kinds of 'gift with exchange' as given below:—

1. The first kind is that in which the 'exchange' is by way of a condition. It is called "Gift with condition of exchange."
2. The second kind is that in which the exchange is not by way of a condition. Rather, the exchange, without any condition, is given by the donee by his own will to the donor. It is called "Gift with exchange."

There is only a difference of form between 'gift with condition of exchange' and 'sale.' So far as 'gift with condition of exchange' is concerned it is a gift till it is not completed by fulfilment of the condition. After its completion it turns into a 'sale'. That is why rules of Islamic Law will apply to 'gift with condition of exchange' until it gets completed. Conversely, the law of sales shall apply to it after its completion. This is all from Hanafi point of view,

Shi'ah point of view :

Al-Hilli in his noted book of Shi'i *fiqh*, *Sharā'i 'Al-Islam* has said, "When a person makes a gift of some property to another person and does not attach any conditions to it the gift shall not require the giving of something in exchange. Thus if the donee in exchange of the gift makes over some thing to the donor and he accepts the same it shall not be valid for the donor to revoke the gift, because the covenant of gift after the acceptance of its return becomes binding (i.e. there remains no right to the donor to revoke the gift). But if initially the donor makes the gift conditional with exchange the condition shall be valid, whether the return is specific or unspecific. The donor shall have the right of revoking the gift till the exchange covenanted to is not made over to him. When the donor has not fixed the measure of return the donee will be at liberty to deliver in exchange whatsoever he chooses, be it small or big. It is not valid for the donor to revoke his gift after he takes possession of the said return and the donee cannot be compelled to rescind the condition of exchange. The donee shall, however, have the option before making his return gift to rescind the gift in his own favour or the exchange he covenanted to make.

In these last cited instances if the original gift property in possession of the donor is wasted the donee shall not be responsible for the same because the waste (or the defect) takes place in the (donor's) property before the donee has made the stipulated return gift, (but this last opinion is not free from doubt).¹¹³

Zahiriyyah view :

According to the *Zāhiriyyah* 'gift with exchange' or 'gift with condition of exchange' is void and the donor ought to revoke his gift in both the cases.¹¹⁴

Section 197. Gift the taking effect of which is postponed to Contingent gift. future time is invalid

COMMENTARY

Gift cannot be made contingent upon the occurrence of an event. Hence, the gift that is contingent upon the occurrence of an event is null and void.

¹¹³Al-Hilli: op. cit., p. 254.

¹¹⁴Ibn Hazm: op. cit., vol. vi, p. 144.

Gift is not valid unless its possession is made over to the donee. Hence it cannot be said about a gift that it shall take effect in future.¹¹⁵

Section 198. When such a condition is attached to a gift that Conditional gift vitiates transfer of ownership, the gift shall take effect as if there is no stipulation contained therein.

COMMENTARY

The author of *Hidayāh* writes that all the Hanafi 'ulamā' are unanimous on the point that when a person makes a gift and embodies therein a vitiating condition, the gift shall be valid and the condition shall be null and void.

Pakistan Rulings :

When the gift is circumscribed by a condition that contradicts its completion, such a condition shall be void and the gift shall take effect as if no condition is attached to it.¹¹⁶ When a gift is made subject to a condition which derogates from the completeness of the grant, the condition is void and the gift will take effect as if no condition were attached to it. (PLD 1975 Lahore p. 1090)

Contingent gift : A gift cannot be made dependent on anything contingent. The word contingent implied that no present interest exists, and that whether such right or interest will ever exist depends upon a future uncertain event. Thus a gift made on the condition that it would be effective if N arrived, or if A married, or if L went to Karachi being a contingent gift would be void. Where a Shi'ah made a gift to "A" for life, and in the event of the death of A without leaving male issue to B, it was held that as regards B the gift was contingent and therefore void. (36 Bom. 214; 12 I.C. 225).

Conditional gift : If a gift of the corpus of the property is subject to a condition which derogates from the completeness of the grant, the condition becomes void and the gift takes effect as if no condition has been attached to it. (PLD 1975 S.C. 377), PLD 1975 Lah. 1090, PLD 1970 Lah. 502; PLD 1960 Kar. 745; PLD 1956 Dacca 143; PLD 1948 P.C. 23). Where A makes a gift of certain property to B and on his death to C, the gift to B would be valid but the condition attached to it would be void. Thus B would take the house

¹¹⁵PLD 1960, Dacca 3.

¹¹⁶AJ-Marghinani: *op. cit.*, vol. iii, p. 291; PLD 1960 Kar. 745.

absolutely and after his death his heirs will inherit it. C will not take it after the death of B. (AIR 1935 Rang. 318=158 I.C. 848).

Where a gift was made subject to promise by the donee to marry his sister to the donor but the donee did not do that, it was held that if the promise alleged by the plaintiff be treated as a condition attached to the gift, then it takes away from the completeness of the grant and accordingly it must be treated as void and the gift must take effect as if the condition was not attached to it. [PLD 1965 (W.P.) Lahore 200.] Where corpus of property was transferred as gift to donee, the intended wife and it was further stated that from then onward the donor and his heirs had divested themselves of all right in that property, but further on in the gift deed certain conditions were imposed, such as the donee would not sell or mortgage the property, would devolve upon her husband and her children born out of the wedlock with him, it was held that upon proper construction of the instrument there remained no doubt whatsoever that the gift in favour of the lady was of the corpus of the property which constituted her an absolute owner of the property and there, the condition prohibiting the sale or mortgage of the property by her during her lifetime became void. (PLD 1975 S.C. 377; PLD 1970 Lah. 502).

Contingent gift and Conditional gift—Distinction : The distinction between a conditional gift and a contingent gift is that in the former case the gift of the corpus of the property is made immediately but a condition is attached to it, whereas in the latter case the gift is not made immediately but is dependent on the happening of an uncertain event. The contingent gift is void, but a gift with a condition is valid, only the condition attached to it is invalid and is not given effect to. (AIR 1940 Mad. 638)

The West Pakistan High Court, Lahore, also in the case of '*Ghulam Qadir vs. Ghulam Hussain*' (PLD 1965 Lah. 200) has held that if an unlawful condition is embodied in a gift it shall be considered to be a gift without condition. In this case the donor alongwith gift made a condition that the donee in exchange of the land given in gift shall give his sister in marriage to the donor. The condition being against public policy and good conscience was held to be inoperative, and the gift was held to be valid without paying any regard to the condition.

Section 199. Gift made during death illness shall take effect as a will, provided that the gift property has, on behalf of the donor, been transferred immediately and irrevocably.

COMMENTARY

Making gift or giving alms dedicated to pious uses by a person laid up with death-illness is not valid except when possession of gift is made over. Hence, if the donee takes possession of the gift it shall be valid.

Pregnancy : A woman who is pregnant would not be considered to be suffering from *Marzul maut*. Though a gift made after the pains have begun would attract the principle of *marzul maut*.

Effect of gift made during marzul maut : When a person is under apprehension of death on account of a disease from which he is suffering the gift which he makes though expressed to take effect during his life is really intended to be a testamentary disposition and can only take effect as such. Therefore if a person has made a gift when he was dangerously ill but he recovers afterwards the gift is valid. If, however, he should die of the disease, and the heirs refuse their assent to the gift, it is valid only to the extent of one-third of his estate, according to the best traditional authority. This evidently assumes that possession was delivered to the donee before the donor's death, for in another place it is stated that if the donor dies after the '*aqd*' (i.e. the contract of gift) but before delivery of possession, the property falls into his inheritance. (PLD 1964 S.C. 143).

Qāḍī Ibn Abī Layla, a contemporary of Imām Abū Hanifah, has said; "Gift made without making over possessions by a sick person is also valid because gift made by a sick person is a will". Indeed, rule of one-third (1/3) is observed in the gift made by a sick person; and the will, on the death of the testator, becomes obligatory and effective though possession of the property may or may not have been taken. Similarly gift made during illness shall not be void (though possession of the same may or may not have been taken) because the cause of death is illness and the act of a person in death-illness becomes final after his death. Thus, if a husband during his death-illness pronounces three divorces to his wife, she shall still be his heir, if the separation between them has occurred on account of his death.¹¹⁷ (during her '*iddat*'). (For detail see vol. i, p. 372 of the Code).

But the Hanafis say that the reason for *hiba* in death-illness not being valid is present in such cases as well. Admittedly gifts and alms dedicated to pious uses by a healthy person without making over possession are not valid. Same is the case with a sick person. His control and power of disposition of property compared to that of a healthy person is questionable. Gift made by a sick person is quite different to his making a

¹¹⁷ Al-Sarakhsī: op. cit., vol. xii, p. 102.

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will, because in will the right to property is created after the death of the testator and in gift there is the covenant of the transfer of ownership during lifetime. Hence, if possession of gift is not made over before the death it shall be void.¹¹⁸

If the donor in his death-illness makes a gift of an undivided property which is divisible, the gift shall not be totally void. If the donee takes its possession the law relating to wills, after the donor's death, namely the rule of one-third shall apply to it and the rest shall go to the heirs. It shall

*be so when there is no other property of the donor except what was given away in gift by him. If the property, however, given in gift is one-third (1/3) of all the properties belonging to the donor, the gift made shall take effect in its entirety.*¹¹⁹

A sick person in his death-illness makes a gift of one-third of his property to the donee and makes over to him its possession as well. The donee, thereafter, assassinates the donor in his death-illness. The gift made shall then revert in favour of the heirs. This will be so because the gift made during death-illness is in operation like a will and obviously a will is, after payment of debts of the deceased, effective only to a one-third of the estate. As the principle is that no will can operate in favour of an assassin of the testator without the permission of the heirs, so also a gift during death-illness can not be implemented in favour of the assassin without the permission of the heirs. The rule is that which vitiates a will shall also vitiate a gift during death-illness.¹²⁰

A donor enjoying good health makes a gift to the donee but seeks to retract his gift while the donee is laid up with death-illness; he shall have to do so only through the *Qāḍi's* decree and in such a case after the death of the donee his heirs or the creditors shall have no right to the property, because the donor's right takes precedence over their right. But if the sick donee returns the gift property on the demand of the donor without the *Qāḍi's* decree, it shall be considered to be a fresh gift on behalf of the (sick) donee in favour of the donor; and in such an event it shall be operative to the extent of one-third (1/3) of the gift if there is no debt against the donee. If he is under a debt and the debt is such that it covers his (the sick donee's) entire property then his returning the gift property shall be invalid and the same shall revert as heritable property left by a deceased

¹¹⁸Ibid.

¹¹⁹Ibid.

¹²⁰Ibid, p. 103-4.

person and thereafter the law of inheritance shall apply to it.¹²¹ In that case, debts owing to the deceased shall be paid off from it in the first instance.

Shi'ah view :

According to Shi'ah jurists too when a person who suffers from a dangerous illness (an illness in which a man is most likely to die, as tuberculosis, or dies in that illness whether it be dangerous or not), makes a gift and then recovers from that illness the gift so made shall be valid. If he dies in that illness and the heirs do not consent to the gift, according to Zāhir al-Riwāyat it shall take effect in respect to one-third (1/3) of the legacy.¹²²

Pakistan Rulings :

Pakistan Courts have unanimously held that the Law of Wills shall be applicable to a gift made during death-illness.¹²³

The High Court of Peshawar in the case of '*Asmat Begum vs. Hussain Jan*' held, that 'gift' made in death-illness shall be considered to be a 'will'. That is to say, in a case where the donor, at the time of making the gift, is suffering from such a disease that becomes the direct cause of his death it was thus held that : "A gift executed in the circumstances detailed below will be taken to have been executed in *Maraz-ul-Maut* and will take effect as a will;

- (1) that the donor was suffering, at the time of the gift, from a disease which was the immediate cause of his death;
- (2) that the disease was of such a nature or character as to induce in the person suffering the belief that death in all probability was very near;
- (3) that the illness was of such an intensity that it had incapacitated him from the pursuit of his ordinary avocation. If a person is unable to stand up in order to offer his prayers, the opinion of the jurists is that it will be presumed that he was not capable of pursuing his ordinary avocation; and
- (4) If a malady, of old standing, reaches a stage that it rapidly increases, and makes the sufferer conscious of the apprehension

¹²¹ Ibid, p. 105.

¹²² Al-Hilli: op. cit., vol. ii, p. 254.

¹²³ *Shamshad Ali Shah v. Hasan Shah*, PLD 1960, Lah., p. 300.

of death, then the malady would at once become a death-illness, and a gift made at such a time would be hit by the doctrine of *Maraz-ul-Maut*.”¹²⁴

In the case of *Jahan Khan vs. Feroze*, Justice S. A. Rahman, a Judge of the High Court of Lahore (as he then was) also held the same view: “It is only where a man’s disease has become so much aggravated that he begins to apprehend that death was more probable than his chance to live, then the person can be considered to be suffering from *Maraz-ul-Maut*.”^{124a}

The Supreme Court of Pakistan in the case of *Shamshad Ali Shah vs. Syed Hassan Shah* held that a gift made in ‘death-illness’ which is invalid, cannot be held to be a ‘Will’ when, from the stipulations made, an immediate and irrevocable transfer of possession of the ‘gift’ property does not appear from the deed of gift.

It was also, in connection with gift made in “death illness”, in the above case held, “It is now well settled that in determining whether the donation of a person suffering from illness comes within the doctrine applicable to *marzul maut* gift, the Court should consider the following facts :

- (i) Was the donor suffering at the time of the gift from a disease which was the immediate cause of his death ?
- (ii) Was the disease of such a nature or character as to induce in the person suffering the belief that death would be caused thereby, or to engender in him the apprehension of death?
- (iii) Was the illness such as to incapacitate him from the pursuit of his ordinary avocations—a circumstance which might create in the mind of the sufferer an apprehension of death ?
- (iv) *Had the illness continued for such a length of time as to remove or lessen the apprehension of immediate fatality or to accustom the sufferer to the malady ?*¹²⁵

When a donor at the time of his making the gift be involved in such an illness that makes him believe that he shall die of that illness and actually after a few hours of the registration of the document of gift the illness ends his life, the Supreme Court held that the gift was made in death-illness.^{125a}

¹²⁴PLD 1956, Pesh. 5.

^{124a}PLD 1951, Lah. 433.

¹²⁵PLD 1964, S. C. 143.

^{125a}Ibid.

For holding the gift made in death-illness to be a 'Will' it is essential that the gift be a complete one; that is to say, the donor, in his lifetime, must have made over the possession of the gift property to the donee.

Mr. Justice Kaikaus in the afore-mentioned case, *Shamshad Ali Shah vs. Hassan Shah* observed as follows :

"So far as the legal aspect of *Marzul maut* is concerned, what is really needed is, as pointed out in *Ibrahim Goolam Ariff vs. Saiboo and others* that the gift should be made "under the pressure of the sense of imminence of death". The rest of the matters which are generally stated in commentaries on Muslim Law as matters requiring investigation in a case of *marzul maut* are really matters relating to evidence. If the gift had in fact been made "on account of pressure of the sense of imminence of death" the gift would be affected by doctrine of *marzul maut*. There is one point which may be clarified here. It is stated in some commentaries and judgments that death should in fact result from a disease if the doctrine of *marzul maut* is to be invoked. I am unable to agree with this proposition. If a person was suffering from galloping tuberculosis and was therefore under apprehension of death when he made the gift, but he was shot dead by some person or died of an accident, or of cholera or some other epidemic a short time after the gift, I do not see why the doctrine of *marzul maut* should not be applicable. Truly speaking even the fact that a person survives and does not die at all should not validate a gift which he made under genuine apprehension of death. The validity of the gift is to be determined with reference to the circumstances as they exist at the time of making the gift. That he subsequently does not die cannot have a retrospective effect, so as to validate an invalid transaction. The true reason for the invalidity of the gift is the state of the mind of the donor who believes that he is going to die. As he believes that he is going to die he has no intention of making a transfer *inter vivos* and his only intention is to make a transfer which will take effect after his death. A transfer takes effect according to the intention of the transferor. If the transferor has no intention of making a gift during his lifetime no such gift will result. The reason why a gift in *marzul-maut* operates as a will is that the intention is to make a testamentary alienation only. This doctrine is not confined to Muslim Law. In Roman Law it is called *donatio mortis causa*, and it also appears in section 191 of the Pakistan Succession Act. In accordance with section 191 gifts "made in contemplation of death" are resumable by the donor if he survives and the power to make such gifts is co-extensive with the power of testamentary disposition. It is true that gifts "in contemplation of death" are gifts which are to take effect in case the donor dies, but authority can be found in any commentary for the proposition that although

the donor does not say so, the presumption in the case of gift made during apprehension of death is, that they are to take effect only in case of death. In 'Jarman On Wills' (1951 Edition) at p. 46 it is stated that "the conditional nature of the gift need not be expressed, it is implied in the absence of evidence to the contrary", and that "if the circumstances authorise the supposition that the gift was made in contemplation of death *mortis causa* is presumed..... On the finding that Mst. Husan Bano was suffering from pneumonia at the time when she made the gift there is a clear case for the application of the principle of *marzul-maut*. The effect of a gift in *marzul-maut* is that it operates as a will. However, in order to operate as a will it is necessary that there should in the first place be a completed gift."¹²⁶

Gift in Marq al-Mawt : In a recent case of the Supreme Court, it was observed that the law applicable to the case is not in controversy. If the gift by Rajwali was made under, what the Privy Council described in *Ibrahim Ghulam Ariff vs. Saiboo* as "pressure of the sense of the imminence of death", then the gift would be hit by doctrine of *marzul-maut*. The same criterion was accepted by this Court in the cases of *Shamshad Ali Shah* noticed earlier. Both these precedent cases set out the following factors which the Court should consider to sustain the conclusion that the impugned transaction was made under such pressure :

- (i) Was the donor suffering at the time of the gift from a disease which was the immediate cause of his death ?
- (ii) Was the disease of such a nature or character as to induce in the person suffering the belief that death would be caused thereby or to engender in him the apprehension of death ?
- (iii) Was the illness such as to incapacitate him from the pursuing of his ordinary avocation—a circumstance which might create in the mind of the sufferer an apprehension of death ?
- (iv) Had the illness continued for such a length of time as to remove or lessen the apprehension of immediate fatality or to accustom the sufferer to the malady ?

The first is essentially a question of fact and the best evidence could be that of a medical attendant who treated the deceased at the relevant time. It is noteworthy that in various cases cited at the Bar some doctor or *Hakim* had appeared to testify to the condition of the patient at or about the time the impugned instrument was executed. Evidence of laymen particularly of relatives may be relevant. But it cannot be conclusive

particularly when it is partisan and exaggerated. In the instant case, it was admitted by Ghulam Fatima plaintiff that though Rajwali remained under the treatment of a *Hakim* at Bhera but he was not examined. I consider this as a serious drawback in the plaintiff's case. The burden of proof of issue relating to *Marz-ul-maut* lay heavily on the plaintiff, and the oral evidence did not inspire the confidence of the trial judge. Therefore what remains of the evidence produced by the plaintiff is the death entry Exh. P.W.6/4 according to which Rajawali died of paralysis. I will presently advert to the evidential value of this entry for the relevant purpose.

The second fact is germane to the state of mind of the donor at the time of execution of the impugned instrument. This is not capable of direct proof by any objective standard as is the case of a height of a person: it is a matter of inference to be raised from certain proved or admitted facts. Whether or not an inference has been rightly raised is always a matter of law or at any rate a mixed question of law and fact and not purely of fact as contended by the respondent's learned counsel. Again the mental condition of a deceased person at a given point of time is a subtle problem more so as in the instant case where the deceased has been suffering for a long time and the ambient circumstances are equivocal.

On the third point the evidence in this case is contradictory or at any rate it is deficient. Even if it may be assumed that Rajwali was bed-ridden and rendered immobile that would not necessarily import death-bed illness. When spinal cord gets affected at lumber region then only limbs are affected. In such paralysis, as will be seen presently, it is not fatal.

As to the fourth condition each case has to be decided on its own facts and no hard and fast rule can be laid as to when the relevant state of mind can be inferred. Rather it has been observed in some cases that if the illness has lasted for a long time it often becomes part of the patient's constitution and the pressure of the sense of imminence of death recedes and it becomes his habit to live with it.

Thus it is wrong to suggest that stroke of paralysis is immediately dangerous to life and that merely because Rajwali was suffering from paralysis it must be inferred that he was under pressure of the sense of the imminence of death. (*Chanan Bibi vs. Mohd. Shafi* : PLD 1977 Supreme Court, p. 28 at pp. 34, 35, 36).

Revocation of gift : A donor may revoke any gift before the delivery of possession. (PLD 1967 Lah. 336; PLD 1955 Lah. 516). When a gift has been perfected by delivery of possession it may be revoked by the donor except in the following cases :

- (1) Where the gift is made to a person related to the donor within prohibited degrees. (PLD 1975 AJK 42; PLD 1968 S.C. 54; PLD 1957 Pesh. 85; PLD 1960 Kar. 492; PLD 1960 Lah. 130; AIR 1952 All. 614),
- (2) A gift by a wife to her husband or by the husband to his wife.
- (3) When the donor or the donee dies.
- (4) When the thing given has been transferred by the donee by gift, sale or otherwise. (50 I.C. 919; AIR 1924 All. 307; 78 I.C. 222).
- (5) When the thing gifted has been lost or destroyed.
- (6) When the thing given has increased in value, whatever the cause of the increase. (AIR 1924 All. 307).
- (7) When the donor has accepted a return ('*iwaq*') of the gift (AIR 1917 Oudh 347; AIR 1914 Mad. 446).
- (8) Where the motive of the gift is religious or spiritual, for in this case the gift is nothing but a *sadaqah*.
- (9) When the thing gifted is so changed that it cannot be identified, as when wheat is converted into flour by grinding. (36 All. 333; 24 I.C. 225).

The discretion of the donor in the matter of revocation is unfettered and the Court cannot declare a revocation made by him to be invalid where it is not prohibited by a positive command of Muslim Law. (PLD 1975 A.J. & K 173).

Gift to person prohibited by marriage : In order that retraction of an otherwise valid gift should become impossible, two conditions are necessary. First, the donee must be prohibited in marriage; secondly he must be related by blood. It is only rational that if the two parties, the donor and the donee belong to the same sex, the sex of one of them should be altered so as to ascertain whether the relationship may be that which forbids marriage. (PLD 1975 Kar. 161; PLD 1975 AJ & K 42; PLD 1957 Pesh. 85; PLD 1960 Lah. 130). The term prohibited in this context being construed as *qarabat dār* and not the persons with whom marriage is prohibited. The Court did not thus accept the orthodox view that the term *Mahram* (prohibited) applies to persons related through blood who are neither sharers nor residuaries and that the grandsons being residuaries gift in their favour could be retracted. (PLD 1968 S.C. 54).

Revocation by implication : Where the father made a gift of some property to his son and subsequently he made another gift by which he gifted away to someone else the property already gifted by him by the previous gift and some more property, it was held that the previous gift stood revoked on account of it. (PLD 1962 Lahore 546).

Only donor can revoke a gift : The right of revocation of gift under Muslim Law is the personal right of the donor and after his death his heirs have no right of revocation. The revocation becomes complete only by a decree of the Court. The mere institution of a suit is not sufficient to complete it. Therefore the right of revocation dies with the donor in case of the donor's death before grant of a decree, or during the pendency of the appeal when the suit has been dismissed in the first instance. But where the suit is for cancellation of the deed of gift it would survive the plaintiff and his legal representatives may be substituted for him. (PLD 1966 Pesh. 121).

Conclusion :

After going through the above discussion one comes to the conclusion that the legality of a gift made is decided in the light of the circumstances that exist at the time of making the gift. After the gift is made the fact of (the donor) not dying cannot have the retrospective effect of making an invalid act to be valid. The real cause of a gift being invalid is the mental attitude of the donor that makes him believe that he is to die very soon. As he believes that he is to die he does not intend making any *inter vivos* transfer. His sole intention remains to make such a transfer that may become effective after his death. The transfer of property takes effect in accordance with the intention of its transferor. If during his lifetime the transferor does not intend to make a gift, such gift shall not be accepted as such. A gift that is made during death-illness takes effect as a 'will'. The reason is that by such a gift the clear intention is merely of transferring property as under a will. (For the definition of *marq at-mawt*, death-illness also refer to "Divorce under death-illness" vol. i, page 372 of this Code.

Section 200. (1) The donor is entitled to revoke his gift at any time before making over possession of the gift property.

Revocation of
Gift

Explanation : If the donor, after making gift but before delivery of its possession, dies, the gift property shall be included in his legacy.

(2) The donor is entitled to revoke his gift even after making over possession of the gift property except when :—

- (a) The donor is the husband and the donee is the wife or vice versa;
- (b) The donee is the blood relation within prohibited degree;
- (c) The donee is dead;
- (d) The gift property goes out of possession and proprietorship of the donee either by sale, gift or other mode of transfer;
- (e) The gift property is either lost or gone waste;
- (f) The basic character of the gift property is changed;
- (g) Some other thing is so mixed up with the gift property that its separation from it be not possible;
- (h) The gift is with exchange;

It shall, however, be essential to obtain a decree from the Court, for the revocation of gift, after making over possession.

COMMENTARY

The Prophet (Sallallahu 'alayhi wa Sallam) has extremely disliked the revocation of gift. There is a tradition in the "*Saḥīḥ al-Muslim*" that the Prophet said, "The person who revokes his gift, is like the dog that licks up what it disgorges."¹²⁷

Al-Nawawī, the noted commentator of '*Saḥīḥ al-Muslim*' has written that the 'dislike' that has been stated in the aforesaid tradition is based on scrupulousness and is not prohibitory.¹²⁸

According to the three Imāms Mālik, Shafī'ī and Ibn Ḥanbal and the majority of the '*ulamā*' to revoke the gift after making over its possession is unlawful. That is to say, when the donee takes over possession of the gift

¹²⁷Al-Muslim: *Saḥīḥ*, Cairo, *Kitāb al-Hibāt*, p. 64.

¹²⁸Ibid, p. 62.

property the donor cannot cancel the gift. But according to Ḥanafis retraction of a gift even after making over possession is also valid; provided the donee is a stranger, not one who is a relation within the prohibited degree; it is not a gift with exchange; or some other thing is not mixed up with the gift property which cannot be separated; or the gift property has not gone out of the proprietorship of the donee.¹²⁹

In the context of gift, stranger is meant that person who is not related to the donee by blood and is not within the prohibited degree. He may be a relative but not in the prohibited degree as a cousin, or he may be no relative but be in the 'prohibited degree' as foster brothers and sisters.

According to Ḥanafis revocation of the 'gift with exchange' is also valid, but after obtaining the 'exchange' revocation is not valid.¹³⁰

Possession not given to donee : Where the donor did not deliver possession of land to the donee, the gift remained incomplete and ineffective. It was always open to the donor to revoke it before the delivery of possession. [PLD 1967 Lah. 336; PLR 1968 (1) W. P. 665—19 DLR (WP) 31.]

Gift to relatives in the prohibited degree not retractable :

Gift sometimes are made by strangers and sometimes by relatives. Gifts made by relatives are favoured because they are made on account of affection. The Prophet (Sallallahu 'alayhi wasallam) alluding to it has said, "The best alms dedicated to pious uses is that which is given to relatives deserving compassion." 'Ibrāhīm Nakh'i has stated of 'Umar that he said, "The person who makes a gift in favour of a relative within prohibited degree and the said relative takes over its possession, it is not valid for that person to revoke his gift". 'Aṭā and Mujāhid too have stated of 'Umar that he said, "The person who makes gift in favour of a relative within the prohibited degree and that relative takes over possession of that gift property, it is not valid for that person to revoke his gift and the person who makes gift in favour of the relative not within the prohibited degree, it is valid for him to revoke unless he has received any exchange for that gift."

As to what "Relative by blood" in the assertion of 'Umar, means is stated in some of the narratives. In this expression is meant the relationship which falls within permanently prohibited degree and not

¹²⁹Al-Marghinānī: op. cit., p. 289-90.

¹³⁰Ibid, Ibn Rushd: *Bidāyatul Mujaṭṭahid*, Cairo, 1379 A.H., vol. ii, p. 332; Damād Āfandī: op. cit., vol. ii, p. 359.

the relationship which does not fall permanently within the prohibited degree.¹³¹

The tradition stated above also supports the principle that gift without making over its possession is not complete. Possession is given importance on the ground that it serves as a block to revocation. The Ḥanafis' argument on this base is that when a father makes a gift in favour of his son it is not valid for him to revoke it. Similar is the case of a gift in favour of his father by a son. The directive prohibiting revocation is with special reference to the affection between the said relatives. In revocation there is an element of disaffection and hostility which extinguishes affection.¹³²

The aforesaid tradition also leads to the inference that a person who makes a gift in favour of a stranger has the right of revoking his gift till he has not received any thing in its exchange as in the Prophet's words *ماله يثب* means 'return' or 'exchange'. Thus on both these questions the Ḥanafis follow the tradition of 'Umar.¹³³

It is reported from 'Ibrāhīm Nakḥ'i that husband and wife are placed in the "category" of kinship (relatives by blood) in this respect. Consequently, if any one of them makes a gift in favour of the other, for none of them it is valid to revoke the gift. The Ḥanafis, conclude from this assertion of Nakḥ'i that relationship between the husband and wife through marriage is accepted as very close. That is why inheritance originates from both sides without any exception and because of this marriage relationship evidence of the one in favour of another is not acceptable. Gift serves the purpose of promoting matrimonial amicability whereas revocation (of gift) creates disaffection and dislikeness between them. Marriage relationship means love and affection. It is, therefore, forbidden for any one of them to take a step that negates love and affection between them. That is why revocation between intimate ones and between relatives is forbidden.¹³⁴

Pakistan Ruling :

Gift to person within prohibited degree not retractible : The admitted position is that a gift in favour of a relation within prohibited degrees cannot be retracted. The term prohibited in this context being construed

¹³¹Al-Sarakhsi: op. cit., vol. xii, p. 49.

¹³²Ibid.

¹³³Ibid.

¹³⁴Ibid, p. 51.

as *qarābatdār* and not the persons with whom marriage is prohibited. The Court did not thus accept the orthodox view that the term "*mahārim*" (prohibited) applies to persons related through blood who are neither sharers nor residuaries and that the 'grandsons being residuaries, gifts in their favour could be retracted. [PLD 1968 S. C. 54—20 DLR (SC) 92.]

Husband's revocation of gift :

If the husband makes a gift in favour of his wife and the wife thereafter separates from him, the husband cannot revoke the gift made by him as it was made during the continuance of marriage. Apparently at that time husband's intention could not be that of making the gift for any exchange. The husband, therefore, cannot revoke such a gift.¹³⁵

Shi'ah Imamiyah :

According to Shi'ah jurists revoking gift by the wife made in favour of the husband and by the husband made in favour of the wife is hateful. Some of their 'ulamā' maintain that the husband and wife in this respect are governed by the rule of 'close relationship'. The first view is more akin to correctness and is in accord with the principles.¹³⁶

Compulsion by the husband—Hanafi view :

It is stated of 'Ali that he said : "When the wife makes a gift in favour of her husband, she may, if she chooses, revoke her gift if she complains of compulsion by her husband in the gift. When the husband makes gift in favour of his wife it is not valid for him to revoke his gift. By this assertion 'Ali does not mean to differentiate in revoking the gift made by them between husband and wife, because of marital relationship, rather it means that if the wife complains of her being compelled, her complaint shall be maintainable, whereas such a complaint of the husband against his wife shall not be maintainable. This is so because apparently the husband is capable of compelling but the wife is not capable of compelling her husband. Besides, apparently also a wife can be intimidated by her husband while a husband has no such fear. Thus gift made by a person under compulsion is not valid because the condition for the validity of a gift is free and complete consent and compulsion annihilates consent."¹³⁷

¹³⁵Ibid, p. 61; *Daṃād Āfandī*: op. cit., vol. ii, p. 362; *Ibn Nujaym*: op. cit., vol. vii, p. 294.

¹³⁶*Al-Hillī*: op. cit., vol. ii, p. 253.

¹³⁷*Al-Sarakhsī*: op. cit., vol. xii, p. 52; *Ibn Nujaym*: op. cit., vol. vii, p. 294.

If a person makes a gift of a divided property to a relative within the prohibited degree and makes over its possession to the donee, it is, then, not valid for him to revoke the gift made. If that person makes a gift of that divided property in favour of a stranger or in favour of a relative not within the prohibited degree then his revoking his gift shall be valid.

Hanafi and Shafi'i views :

In the event of gift made in favour of a stranger, according to the Hanafis, the right of revoking it continues till the compensation for it is not received by the donor from the donee, though morally 'having recourse to' is not virtuous. According to Imam Shāfi'i, however, in the event of a gift made in favour of a stranger revoking it by the donor is not valid. Al-Shāfi'i, in support of his assertion, argues from the Prophet's saying, "The donor should not revoke his gift except when the father makes gift in favour of his son." There is another report that the Prophet said, "It is not lawful for the donor to revoke his gift except when the father has made the gift in favour of his son." According to Shāfi'i, therefore, the Prophet has forbidden such revocation or has held the same to be unlawful, and proceeding to that end is legally invalid. Besides, the Prophet said, "The one who revokes his gift is like the one who after vomiting licks up that what he vomits." In another narrative it is said, "He is like the dog who throws up and then he licks up what he throws up". According to Shāfi'i swallowing the vomiting what is thrown up is forbidden. Likewise, revocation of gift is also forbidden. The reason is that gift is a covenant for proprietorship, that is to say, it is a covenant that makes one the proprietor. The covenant for ownership being absolute, does not admit of revocation as is the case with 'sale'. Further, the purpose being to make one the proprietor, the revocation is opposed to the said purpose.

Hanafis' Argument :

The Hanafis with respect to the tradition narrated by 'Ali argue that the said tradition is *mawqūf* (i.e. no testimony for it is traceable from the Prophet). But there is another *marfū'* tradition of the Prophet. He said, "The donor is more entitled to his gift till he has not received compensation for the gift." In this tradition, the Prophet supports the right of the donor to revoke his 'gift' after its possession is made over, for the gift is incomplete before possession by the donee (and the Prophet supports the revocation.) The Prophet with respect to the right of revocation could have referred only to the donor because the gift property before the gift belonged to him.¹³⁸

¹³⁸ Al-Sarakhsi: op. cit., vol. xii, p. 52.

In the tradition narrated by Abū Hurayrah, the Prophet is stated to have said, "The person who makes a gift and thereafter he intends to revoke it, he must realise the evil of his act and must stop from acting upon it." In another narrative it is said, "The person who makes a gift, if he thereafter intends to revoke it, he ought to ponder over the virtue of abstaining from his act and stop from acting upon it."¹³⁹

It is reported of Abū al-Dardā that he said, "There are three kinds of the makers of gift. One is he who makes the gift by way of charity towards pious uses, for him revoking his gift is not valid. The second is he who makes the gift on the expectation of a gift made by another in his favour, for him revoking his gift is valid till he has not received the said compensation. The third is he who makes the gift with the stipulation of exchange. This gift is a loan in his lifetime as well as after his death." It means that the gift that is made in favour of strangers is for the purpose of compensation and exchange. This is a presumption based on 'urf (custom) and general practice. A man makes a gift either in favour of a person who is higher in rank to him so that he may draw benefit from that person's rank or in favour of a person who is lower in rank to him so that the donee may be of service to him or in favour of a person who is equal in rank to him so that he may (in due course) remunerate him.¹⁴⁰

It is clear from this that the right of revocation is not an intendment of the covenant of gift; rather it is the cause of defeating the purpose of the covenant. The purpose of gift is an expression of magnanimity and beneficence in the sense that the custom or practice that becomes well known is at par with a stipulation made. And in giving away even gratuitously where recompense is expected (according to custom) a show of magnanimity and beneficence is also intended.¹⁴¹

The Prophet (Sallallahu 'alayhi wa Sallam) said "تهادوا تحابوا" i.e. 'Make gifts to each other so that love may increase'. The 'nominative case' has been used here directing both the parties to perform an act i.e. gift be made from both the sides. In other words, it means that gifts be made from both the sides in favour of each other so that love between them may grow.

It has been narrated of 'Umar that he gave away his horse in the name of God, that is to say, he made a gift of his horse. He, thereafter, found

¹³⁹Ibid, p. 53.

¹⁴⁰Ibid, p. 54.

¹⁴¹Ibid, p. 54.

that the horse was being sold. He, thereupon, intended to purchase the horse and asked the Prophet about it. The Prophet said, "Do not revoke (reclaim) what you have dedicated to pious alms." The fact is 'purchasing' (back) does not come under the rule of revoking (reclaiming) what has been dedicated to pious alms.' From this it is meant that revocation with good intention and grace as well is not approved.¹⁴²

The tradition, wherein the act of revocation has been compared to the act of dog's licking up what it throws up, in fact, proves the act of revocation to be vile.¹⁴³ The reference to a dog is intended to emphasise the abhorrence of the act as a dog is of unclean habits.

When a father makes a gift in favour of his son, according to Ḥanafis, it is not valid for him to revoke it. The father, according to Shāfi'i, has the right of revoking the gift made in favour of his son. According to the present writer, the practice of the Ḥanafis with respect to the meaning and purpose of gift is preferable.

Retraction — another example :

A person makes a gift in favour of a woman and thereafter he marries her. The person has the right of revoking the gift because at the time he made the gift the woman was a stranger to him which points to the fact that his design was to have some return, in which he did not succeed. It has been said that the object of gift made was to have the woman in marriage in which he did succeed and thereby he did attain his object. Therefore, he could not retract his gift. The Ḥanafis, in answer to this, argue that the said design or the object itself is not conformable to the dictates of Shari'ah,¹⁴⁴ (and hence the gift was retractable).

Zahiriyyah's rule :

According to the view of Ibn Hazm al-Zāhiri the use of the word 'gift' makes the gift absolute. According to him the donor, therefore, has absolutely no right of retracting his gift. In two events, however, this can be validly done : (i) When fathers or mothers make gift in favour of their sons or daughters (children), they both have the right, at all times, of retracting their gifts, whether the children be majors or minors, and whether the children may have converted or not the gift into an exchange in their matrimonial alliance (i.e. named it as dower of their wives), and also whether or not in its exchange a contract of loan has been entered into by

¹⁴²Ibid.

¹⁴³Ibid.

¹⁴⁴Al-Sarakhsi, vol. xii, p. 60-61; Damād Āfandī; op. cit., vol. ii, p. 362.

them. However when such a donee dies, retraction shall not be valid. Also, after the gift is made reclaiming the income or the proceeds of the gifted property shall not be valid. If in the event of gift made by parents, a portion of the gift to the donees is destroyed and a portion of it remains intact, it is valid for the parents to retract the portion so remaining intact.¹⁴⁵

It appears that Ibn Hazm, in the matter of retraction from gift, literally follows the tradition of 'Umar but it, in fact, relates to morality. However, in the matter of retraction of gift by a father made in favour of his children, he is in line with Imam Shafi'i.

Shi'ah view :

If a man makes a gift and after making over possession of the gift property to the donee, sells that property to some one other than the donee, then if the donee is one of the donor's relatives, the sale shall not be valid. Likewise, if the donee is a stranger and the donor has received compensation for his gift, the sale of the gift property shall not be valid. If, however, the donee is a stranger and from him the donor has received no compensation and he (the donor) sells the gift property, some of the '*ulamā*' hold that the sale shall be void because the donor, in the circumstances, sells a property of which he is no longer an owner; while some other '*ulamā*' say that the sale shall be valid because the donor, in the said circumstances, may validly retract his gift. The first opinion is more correct on principle. If the gift is irregular, (*fāsid*) the contract of sale shall always be valid whether the donee is a relative or a stranger, whether the donor has received compensation for the gift or not. The same rule shall apply in the case when a person sells the property which he would inherit believing the owner legator to be alive when after the execution of the sale deed, it turns out that the owner was dead at the time of the execution of the said sale deed; the sale in such an event shall be valid because, in the hypothetical case, the vendor in fact sells that property of which he is the owner.¹⁴⁶

Annulment after compensation :

Receiving compensation for a gift is an impediment to retraction of the gift because the exchange which is the purpose of the gift has been completed. In the Prophet's saying, "مالم يشب" there is the proof of the fact that there is no retraction after receiving compensation.¹⁴⁷

¹⁴⁵Ibn Hazm: op. cit., vol. vi, p. 155.

¹⁴⁶Al-Hilli: op. cit., p. 254.

¹⁴⁷Al-Sarakhsi: op. cit., vol. xii, p. 56; Ibn Al-Humām: op. cit., vol. vii, p. 133 (also see Hidayah o. m.); Al-Kasānī: op. cit., vol. vi, p. 129.

When the donee gives the exchange of the gift to the donor and the donor takes possession of the same, the donor shall not be entitled to retract his gift nor the donee shall be entitled to reclaim the compensation given.¹⁴⁸

'Gift with condition of exchange' is equivalent to sale.¹⁴⁹ If a person makes a gift in favour of another with the condition of compensation to be received by a certain day, (both the parties agreeing) but one does not give possession of the exchanged property agreed to be given in to the other, rather he goes to the extent of refusing to make over the agreed compensation to him, the first one, then, may retract his gift.¹⁵⁰ But, had property been exchanged on both sides the gift would have been valid (because the exchange would have stood completed from both sides).

If a property is given in exchange of half of the gift, the donor has the right of retracting the remaining half.¹⁵¹

A piece of land is given by a person in gift to another person. The donee builds a house on that piece of land. The donor then intends to retract his gift. He takes his case before a *Qāḍī*. He (the *Qāḍī*) holds that the donor has no right to retract his gift. The donee, after that, demolishes his house. The impediment for the donor to retract his gift is thus removed and he may annul his gift.¹⁵²

The fact is that any increase attached with the gift property becomes an impediment to the right of retraction. In short, the increase accrued with the original gift property, whether it is because of the act of the donee or in natural way, shall be an impediment to the right of retraction. The reason is the original gift property becomes impossible to be returned without the accretion and the accretion is not the gifted property that retraction may be

¹⁴⁸Al-Sarakhsī: op. cit., vol. xii, p. 75; Al-Kāsānī: op. cit., vol. vi, p. 131; Ibn Nujaym: op. cit., vol. vii, p. 319.

¹⁴⁹Al-Sarakhsī: op. cit., vol. xii, p. 79; Ibn Nujaym: op. cit., vol. vii, p. 321; Ibn al-Humām: op. cit., vol. vii, p. 138.

¹⁵⁰Al-Sarakhsī: op. cit., vol. xii, p. 79; Ibn Nujaym: op. cit., vol. vii, p. 318; Al-Kāsānī: op. cit., vol. vi, p. 132.

¹⁵¹Al-Sarakhsī: op. cit., vol. xii, p. 82; Ibn Nujaym: op. cit., vol. vii, p. 319; Al-Kāsānī: op. cit., vol. vi, p. 132.

¹⁵²Al-Sarakhsī: op. cit., vol. xii, p. 85-86.

effected, as it is not possible to separate the original gift property from its accretion, for instance, further constructions are made in the original building or such trees are made to grow on the land that are of permanent nature or a cloth is given a fast colour or shirts or coats are made of the gifted cloth. Indeed, if the accretion be separable (from the original gift) retraction shall be valid whether it is natural accretion to the original gift property or it accrues extraneously.¹⁵³

If the donor of a slave girl intends to annul the gift respecting her and she is pregnant then if the accretion (pregnancy) is not sinful (i.e. the pregnancy is either from her master or from her husband) the donor cannot retract the gift respecting her. But if, however, the increment (pregnancy) is sinful, he may retract the gift.¹⁵⁴

Suppose a slave girl at the time of her being made a gift is ugly but later on she becomes beautiful and comely. The donor cannot take her back as beauty and comeliness are at par with improvements. Indeed, in the reverse case, retraction of such gift shall be valid because deterioration is no impediment to the right of the donor to retract the gift.¹⁵⁵

The donor makes a gift of iron billets to the donee. The donee makes a sword out of them; or the donor gives some papers to the donee, and he writes on it, the donor in such cases can not retract because the change in the material or the addition to the material accidentally or by the act of the donee brings about an accretion in the material which becomes an impediment to the having of the gift annulled.¹⁵⁶

Change in value of gift property :

It has already been stated above that there is no right to retract the gift of a property, if accretion is effected therein, because the right of retraction is available only against the gifted property. The increment effected in the gift property was not included in the gift made and return of the gift

¹⁵³Al-Kāsānī: op. cit., vol. vi, p. 129; Ibn Nujaym: op. cit., vol. vii, p. 317.

¹⁵⁴Al-Sarakhsī: op. cit., vol. xii, p. 88.

¹⁵⁵Ibid; Damād Āfandī: op. cit., vol. ii, p. 361.

¹⁵⁶Al-S2rakhsī: op. cit., vol. xii, p. 88-89.

property alone without the attached increment is impossible. That is why because of the increment effected therein, retraction to the gift made cannot be had.¹⁵⁷ But if only its price increases the right of having recourse to it shall not lapse because increase in the price is no accretion in the corpus of the original property. The increase in the price rather takes place due to the enhanced demand of the property, the corpus remaining in the same state as of old.¹⁵⁸ For example, the donor makes a gift of a piece of cloth. The donee gets it coloured red or yellow or gets it stitched, the donor, then, cannot retract this gift.¹⁵⁹

Shi'ah View :

Najmuddin al-Hillī has held that when the donor retracts the gift which can be validly annulled, (for instance, the gift made to a stranger without exchange) and deterioration causing considerable loss may have occurred in the gift property, a claim of damages by the donor from the donee shall not be valid, because the defect has occurred when the property was of the donee which he held in possession as an owner irrespective of whether the defect may have occurred because of his own act or of any other cause. In a gift property when some inseparable increment (as getting fat of an animal) it shall be the property of the donor after his having retracted from his gift. But where a separable increment (as trees bearing fruits and animals bearing young ones) takes place, then, if the increment takes place after the gift is made it shall belong to the donee and if the increment is there prior to and at the time of making the gift it shall belong to the donor.¹⁶⁰

When the donee gets the cloth given to him in gift coloured then if we are convinced that such use is a bar to retraction of the gift, it shall not be valid for the donor to retract the gift. If, however, we are convinced that such act and the situation (when the donor is a stranger) are not an impediment to the annulment of the gift, the donee shall be a sharer in the cloth to the extent of the value of the colouring material.¹⁶¹

¹⁵⁷Ibid, p. 56.

¹⁵⁸Ibid.

¹⁵⁹Ibid, p. 83; Al-Kasānī: op. cit., vol. vi, p. 129; Abdullah b. Mahmūd b. Mawdūd d. *Ikhtiyār li ta'lil al-Mukhtār*, Cairo, 1951, vol. ii, p. 50.

¹⁶⁰Al-Hillī: op. cit., p. 254.

¹⁶¹Ibid.

Donee's ownership lost :

If the gift property passes out of the ownership of the donee, the donor has no right of retracting it, because the gift property has passed to the ownership of another person. The gift property has thus become another's property as by transfer of its ownership, the principal characteristic of the property does change. Besides this, when the donee makes actual use of the gift property, the gift attains its final purpose. Giving the right of retracting such a gift would mean the extinguishment of the right of the donee in the property which is not possible as the property now belongs to another.¹⁶²

If the gift property gets lost by the donee before its possession is taken back by the donor through the decree of a *Qāḍī* (apparently on retraction) and the donee must have stopped the donor from taking over its possession inspite of his demand, the donor shall then be entitled to recover the price of the gift property by way of damages from the donee.¹⁶³

If the gift property is destroyed or lost or the donee himself utilises it, or the gift property goes out of the possession of the donee, or the donee gives the gift property to his minor son or to a stranger by way of gift or otherwise, or the gift property in possession of the donee increases in utility (but not in price), it then shall not be valid for the donor to retract the gift.¹⁶⁴

If a gift is made of a building and the building gets destroyed completely, it shall be valid for the donor to reclaim the land, (by way of retraction) because the diminution in the corpus of the property will not act as an impediment to retraction.¹⁶⁵

If some property is received in exchange of half of the gift property the donor is entitled to retract the remaining half of the gift property and the gift property may be divided into parts for arranging the exchange. The donor is not entitled to have recourse to his gift (after the possession is

¹⁶²Al-Sarakhsī: op. cit., vol. xii, p. 56; Al-Kāṣānī: op. cit., vol. vi, p. 129.

¹⁶³Al-Sarakhsī: op. cit., vol. xii, p. 82; Dāmād Āfandī: op. cit., vol. ii, p. 364.

¹⁶⁴Al-Sarakhsī: op. cit., vol. xii, p. 83.

¹⁶⁵Ibid.

made over to the donee) without the decree of a *Qāḍī* except when the donee himself returns the gift property to the donor. If the gift property is lost prior to its possession being taken back from the donee by the donor through the decree of a *Qāḍī* (without refusal on the part of the donee to return it back) in that case it is not valid for the donor to realise damages for its price from the donee.¹⁶⁶ But in case of refusal to return it back, its price of the decree of the *Qāḍī*, damages may be recovered from the donee.

When the gift property is perishable or has perished or passes out of the ownership of the donee through gift or otherwise to his minor son or a stranger or the gift property is spent up on welfare by the donee himself, it shall then not be valid for the donor to retract his gift.¹⁶⁷

When the gift property is a building or is a land on a portion of which a building is constructed or trees are grown thereon, the donor shall have no right of having recourse to the gift on account of these additions.¹⁶⁸

If the gift property is a building and it is completely destroyed after the gift is made, the donor shall have the right of retracting the gift.¹⁶⁹

Shi'ah Point of View :

When possession of the gift property has passed to the donee then if the donees are parents it shall not, by consensus, be valid for the donor to retract the gift. Likewise, if the donee has some other relationship with the donor retraction will not be valid, though in this matter there is difference among the '*ulamā*'. If the donee is a stranger and the gift property is in existence retraction of the gift by the donor shall be valid but if the gift property is destroyed retraction shall not be valid. In the like manner, if the donee is a stranger and the donor takes from him some compensation, however small, retraction of the gift shall not be valid.¹⁷⁰ If the donee so utilises the gift property that it does not get destroyed (as wearing of clothes) whether or not such gift shall become incumbent and cannot be retracted from, some '*ulamā*' maintain that it shall not be retracted and some say it may be retracted and this view is beyond doubt in conformity with the principle of jurisprudence.

¹⁶⁶Ibid, p. 82; Al-Kāsānī: op. cit., vol. vi, p. 131; Dāmād Āfandī: op. cit., vol. ii, p. 363.

¹⁶⁷Al-Sarakhsī: op. cit., p. 83.

¹⁶⁸Ibid.

¹⁶⁹Ibid, Dāmād Āfandī: op. cit., vol. ii, p. 360.

¹⁷⁰Al-Hilli: op. cit., p. 253.

Retraction after donor's death :

If the donor dies his heirs have no right to retract the gift made by him, because after the covenant of gift is made the property does not remain heritable, for the heirs cannot succeed to the property which does not belong to the deceased at the time of his death.¹⁷¹

If the donor after the making of covenant of gift dies before making over its possession to the donee, the gift property shall be included in his legacy.¹⁷²

Retraction during death-illness of the donee :

There are two opinions reported respecting the question whether the donor has or has not the right of retracting his gift during the death-illness of the donee. One is to the effect that he may retract the entire gift. The other is to the effect that it may be retracted with respect to one-third (1/3) only, because donee's being stricken with death-illness involves the rights of his heirs in the property.¹⁷³

Retraction after the death of the donee :

When a donee dies, his property devolves upon his heirs. If the donee, in his lifetime, transfers his property to someone else the donor has no right to retract the gift. Likewise, the donor, after the death of the donee, has no right to retract the gift (because on the death of the donee, the rights of his heirs are simultaneously created in that property).¹⁷⁴

Pakistan Rulings :

Mr. Kayani and Habibullah Khan JJ have held in the case of *Aurangzeb vs. Daud Khan* (PLD 1957 Peshawar, page 85): "The word which denote the prohibited degree of relationship are 'ذی رحم محرم' (the prohibited person who is related). The use of 'نسب' introduces relationship by blood and excludes foster-relationship. Thus, in order that *retraction* of an otherwise valid gift should become impossible, two conditions are necessary.

¹⁷¹ Al-Sarakhsī: op. cit., vol. xii, p. 56; Dāmād Āfandī: op. cit., vol. ii, p. 361; 'Abdullāh b. Maḥmūd b. Mawdūd: op. cit., vol. ii, p. 51.

¹⁷² Al-Hillī: op. cit., p. 253; Al-Sarakhsī, vol. xii, p. 56.

¹⁷³ Ibid, p. 85; Al-Kāsānī: op. cit., vol. vi, p. 129.

¹⁷⁴ Al-Sarakhsī: op. cit., vol. xii, p. 56; Dāmād Āfandī: op. cit. vol. ii, p. 361.

First, the donee must be prohibited in marriage; secondly, he must be related by blood.”

In the case of *Muhammad Latif vs. Muhammad Nawaz* (PLD 1960 Lahore page 130), Mr. Justice Muhammad Shafi held: “Under the Muhammadan Law a gift by one person to another who is so closely related (e.g., brothers) that the marriage between the two, if it could physically take place (i.e., if the two belonged to opposite sexes), would be illegal, cannot be revoked. The donor and the donee need not be of the opposite sex so as to come within the prohibited degrees of relationship for purposes of revocation of a gift...The words “prohibited degree” must be given artificial meaning as describing the degree of relationship which should be such as to exclude the legality of marriage between the two, were such a marriage physically possible. These words cannot be given the literary meaning..... A gift to a step brother is therefore irrevocable.”

Right-a Personal One : The High Court of West Pakistan, Peshawar Bench has in the case of *Abdur Rahman vs. “Khalilur Rahman* laid down: “In the case of revocation, it being a personal right of the donor, it dies with the donor in case of the donor’s death before grant of a decree, or during the pendency of the appeal when the suit has been dismissed in the first instance. He, however, says that as the suit is one for cancellation of the deed under section 39 of the Specific Relief Act read with the various provisions of section 15 to 18 of the Contract Act, the suit is not only competent but also the right to sue survives after the death of the donor plaintiff. He maintains that in the case of revocation of gift under Muhammadan Law no legal defect in the deed need be pleaded or established and it is the sweet will of the donor to revoke the gift in all cases before delivery of possession and in cases other than those specified by Muhammadan Jurists, after delivery of possession. Whereas in the case of cancellation of a gift deed, the transaction of gift is itself assailed because of certain failings attributable to the incapacity of the executant or his free consent. The argument of the learned counsel for the respondents is not without force and I hold that on the pleadings of the parties and the words used in the plaint itself the donor was not asking for the revocation of the gift, but she had come forward for cancellation of the deed of gift on the basis of non-delivery of possession, undue influence, fraud, coercion and misrepresentation and it was independently of her right to revoke the gift in exercise of her powers under Muhammadan Law. The suit not being for enforcement of a personal right. the right to sue survived and the cause could be legitimately continued by the legal representatives of the deceased donor.”¹⁷⁵

¹⁷⁵PLD 1966, Pesh. 121.

Revocation of gift : In the case of revocation, it being a personal right of the donor, it dies with the donor in case of the donor's death before grant of a decree, or during the pendency of the appeal when the suit has been dismissed in the first instance. But where the suit is for cancellation of the deed of gift, it would survive the plaintiff and his legal representatives may be substituted for him. [PLD 1966 (W.P.) Pesh 121].

Revocation of gift : Revocation of gift can be effected by donor at any time before delivery of possession. Possession, however, once delivered gift cannot be revoked by a mere declaration. Decree of Court is required in such eventuality to nullify gift. In a case where the donee transferring subject of gift to a third person before revocation taking effect under decree of Court, it was held that donor was left with no power to revoke the gift. (PLD 1977 Lah. 1347).

Section 201. Charity is a gift made for no consideration
Charity (*Sadaqa*) except expecting reward in the Hereafter.

COMMENTARY

In charity, like gift, transfer of possession is necessary. However, the giving in charity of *mushā'* (joint property) is not valid. Charity after transfer of possession cannot be taken back.¹⁷⁶

Charity and Gift :

The difference between charity and gift is in respect of the purposes for which they are made. The purpose of gift is to show love for the donees or is to establish in their eyes one's own magnanimity and reverence; whereas the purpose of offering charity is to gain God's pleasure.

Charity and Charitable Endowment (Waqf) :

The difference between 'Waqf' and Sadaqah : The difference lies in the fact that in the case of sadaqah the corpus of the gift may be consumed but that cannot be done in case of waqf. (34 Mad. 12; AIR 1930 Bom. 191; 127 I.C. 401).

The difference between charity and endowment (waqf) is that in case of charity the property given may be itself expended whereas in endowment (waqf) only the income of the property endowed may be expended.

¹⁷⁶Al-Sarakhsī: op. cit., vol. xii, p. 92; Ibn al-Humām: op. cit., vol. vii, p. 144 (also see Hidayah o. m.).

Accordingly to Hanafis, the charity is like gift, because in charity no proprietary right is created without the transfer of possession to the one in whose favour it is made. Imām Mālik differs on the point. According to him, the proprietary right gets established in charity without the transfer of possession. There is, in this regard, difference of opinion among the *Siḥābah* and *Tābi'ūn* as well. Thus 'Ali and Ibn Mas'ud declare "when offering of some thing by way of charity is proclaimed it is valid". Ibn Abbas and Mu'adh b. Jabal, on the contrary, hold that "charity without transfer of possession is not valid". There are two cases reported in this respect from Qāḍī Shurayh and Ibrahim Nakḥī. The Hanafis have adopted the tradition narrated by Ibn 'Abbās. They have interpreted the opinion of Ali and 'Abdullah b. Mas'ud to refer to those offerings that are made by men in favour of their minor children and such propitiatory offerings (gifts) get completed by mere announcement because the persons making the offerings remain in possession of the property so offered on behalf of their minor children. The basis of this interpretation of the Hanafis is the Prophet's statement, "Men say, 'My property.' But for you there is nothing in your property except what you eat and thus spend from it, or what you wear and make old, or what you give in charity and make it pass off. Whatever is then left over belongs to the heirs".¹⁷⁷

Charity gets completed by transfer of possession. Its retraction or revocation by the one making the offering is not valid, whether made in favour of relatives or strangers. The reason is that making propitiatory offering is to obtain heavenly reward and that purpose is achieved by declaration of the offering. Hence after the completion of the propitiatory offering and the realization of the purpose revocation is not valid. The one who makes the propitiatory offering passes its ownership to Allah and hands it over to another in need. The property, therefore, passes to the needy from God. It creates no obligation in favour of the maker of the offering against the person who comes in possession of such property. Therefore, there remains no right of having revocation of the *ṣadqah*, (by the maker of propitiatory offering), because, in case of propitiatory offering, the proprietary right of the one making the offering extinguishes. He, therefore, cannot revoke it. This is so irrespective of the fact whether the donee be Muslim or non-Muslim as this creates no change in the purpose of the offering.¹⁷⁸

A person makes a gift in favour of poverty-stricken people and makes over to them possession of the same as well. He on the basis of *iṣtiḥsān*

¹⁷⁷ Al-Sarakḥī: op. cit., vol. xii, p. 48.

¹⁷⁸ Ibid, p. 58.

cannot have recourse to it. On the basis of *Qiyās* too he has no right of having recourse to it as the charity is made in favour of the needy and poverty-stricken people with the intention of earning reward in the world hereafter and not with the intention of having any other consideration.¹⁷⁹

The Caliph 'Umar's verdict is, "No revocation is possible of the gift that is made with charitable object or is made by way of propitiatory offering".¹⁸⁰

Muḥammad al-Shaybāni cites the example of a person who builds a mosque in his house. People offer prayers in it. The person dies. The house (alongwith the place used as mosque) shall go by inheritance to the heirs because the deceased person did not exclude the mosque from his property. It shall be taken as a 'Propitiatory offering of undivided share in the joint property' which is not valid.¹⁸¹

Shi'ah point of View :

Najmuddin Abū Ja'far al-Hilli has, in his noted book on Shi'ah fiqh *Sharā'i' al-Islām* writes that 'propitiatory offering' is a contract that requires offer, acceptance and transfer of possession. If a person without the will of the owner gives possession of the offered property to the person who is to be offered the property or the latter takes possession on his own, the property shall not pass to him. After making over possession of the property given in propitiatory offering having its revocation is not, under true religious concept, valid; because the object of propitiatory offering is reward for virtue which object the one who has made the offering has already gained. Thus, propitiatory offering is a sort of 'gift for exchange' wherein retraction is not valid.¹⁸²

Zahiriyyah's View :

According to Ibn Ḥazm al-Zāhiri gifts, propitiatory offerings and grants are all of the same order. All these covenants get completed merely by declaration of the maker.¹⁸³

Section 202. Lending or borrowing a thing for use with such permission that may at any time be revoked by the lender is called '*Āriyat* (Licence).

**Ariyat*
(Lending)

¹⁷⁹Ibid, p. 93.

¹⁸⁰Ibid, p. 94.

¹⁸¹Ibid.

¹⁸²Al-Hilli: opp. cit., p. 251.

¹⁸³Ibn Hazm: opp. cit., vol. vi, p. 142.

COMMENTARY

By 'Ariyat (licence) proprietary right is not created in the borrower. Rather a temporary right of use of that thing, to the extent and till the time allowed, is created therein. 'Ariyat, as against gift, can in all events be revoked.

'Ariyat means a gift of 'usufruct'. In 'Ariyat, revocation may be had whereas in gift retraction may only be had in certain circumstances.¹⁸⁴ According to Zāhiriyyah, 'Ariyat is a commendable act and sometimes it becomes obligatory.¹⁸⁵

'Ariyat's law and the Majallah :

The gist of the rules that have been framed respecting 'Ariyat in *Majallatul Ahkām al-Adliyah* is given below :—

Section 804. By proposal and acceptance and by delivery 'the lending for use' becomes a concluded contract.

Section 806. The lender can revoke the lending whenever he wishes.

Section 807. If either the lender or borrower dies, the contract for use becomes annulled.

Section 810. As regards property lent for use the possession is a condition. No right is created before passing of the possession.

Section 811. The thing lent for use must be certain and defined.

Section 812. The borrower becomes entitled to use without payment of the benefit of the thing loaned to him for use.

Section 813. The thing lent for use is an *amānat* (trust) in the hands of the borrower.

If, without his fault or neglect, the thing lent is destroyed or perishes, or if it loses its value, there is no ground to claim damages.

Section 814. When there has been a fault or neglect on the part of the borrower resulting in loss or destruction of the thing lent, then whatever the cause, the borrower shall pay damages.

Section. 815. The maintenance of the thing borrowed is the responsibility of the borrower.

¹⁸⁴PLD 1958, Lah. 189.

¹⁸⁵Ibn Hazm: op. cit., vol. vi, p. 205.

Section 818. Where a loan for limited use has been made, the borrower cannot go beyond the limit which is permitted. But he can put it to a different use to a lesser or equal limit.

Section 823. The borrower cannot let, or pledge to another a thing lent to him for use, without the leave of the lender. Any property which has been lent to be made a pledge for a debt in one venue cannot be pledged for a debt in another venue. In case of breach of condition causing loss, damages are obligatory.

Section 825. When the lender has demanded back the thing lent for use, the borrower must immediately return and deliver it. In case of delay without good cause if the thing lent is destroyed, or perishes, or it loses its value the borrower shall be liable to pay damages.

Section 826. The return of a thing lent temporarily after the time fixed expressly or impliedly shall be necessary. But such delay as is usual shall be excusable.

Pakistan Ruling :

'Ariyat scope and essentials of: "In the words of *Hidayah*, '*Āriyat*' signifies an investiture with the use of a thing without a return", and *Karakhi* and *Shafi'i* define it, "simply, a licence to use the property of another". Further '*Āriyat* is resumable at pleasure of the licensor, vide page 478 of the *Hidaya*. Another remarkable feature of '*Āriyat* is that the borrower cannot let out the thing given to him under the licence. Furthermore, if the land has been borrowed for the purpose of building and plantation, the lender is at liberty to resume it. According to Syed Ameer Ali, the grant of the usufruct for a limited time, without consideration and resumable at will, is called '*Āriyat* (*Commodatum*). It constitutes a person, the owner of the usufruct of a property without consideration". [PLD 1972 Pesh. 37 (DB)].

'Ariyat : Gift under Muhammadan Law is a transfer of the property by one person to another, made immediately and without any exchange and accepted by or on behalf of the latter, whereas '*Ariyat* is transfer of some limited interest in the benefits, produce, profit or usufruct of a property for a limited period. In other words, *hiba* is transfer of ownership without consideration and an '*Ariyat* is not a transfer of ownership but a temporary licence to enjoy the profits so long as the grantor pleases. (PLD 1975 Lahore, 1484).

CHAPTER XXVII

(Law of Waqf

Section 203. (a) Waqf is a transfer of the corpus of valuable property to the ownership of Allah with a declaration of dedicating its usufruct perpetually for religious, charitable or pious purposes as recognised by Shari'at.

Definitions

(b) The dedicator of Property in waqf is called "*Wāqif*" or the "Founder of waqf" or the "Creator of waqf".

(c) The person or group of persons for whose benefit the "waqf" is created is called (Beneficiary) *Mawquf 'Alaih* or *Mawquf 'Alayhim* (Beneficiaries).

(d) The document through which the waqf is created is called *Waqf nāmah* (Waqf deed).

(e) If a waqf is created with a condition that it shall take effect after the death of the *wāqif* it shall be called "*Waqf bil Waṣiyyah*".

(f) The person who is appointed to carry out the purposes of the waqf and act in accordance with the direction of the waqif is called "Mutawalli" (Manager).

COMMENTRY

The literal meaning of the word "waqf" is 'stopping,' 'binding' or 'keeping' in custody, detaining, closing or imprisoning.¹ According to Abū Ḥanīfah detention of a specific property in the ownership of the Wāqif and appropriation of its profits or usufructs in charity for the poor or other good deeds is called Waqf". According to the Sāhibayn (Abū Yūsuf and Muḥammad) Waqf denotes the extinguishment of the proprietor's ownership in the property dedicated and its detention in the implied

¹Al-Sarakhsi (d. 482 A.D.): *Al-Mabsūt*, Cairo, 1324 A.H., vol. xii, p. 27; Al-Marghīnānī, Burhan al-Din, (d. 593 A.H.): *Al-Hidāyah*, Karachi, vol. ii, p. 637.

ownership of God in a manner that its usufructs may accrue to or be applied for the benefit of humanity.²

Abu Hanifah's View :

According to Abū Hanīfah the conception is that the corpus continues in the ownership of the "Wāqif" and the dedication of its usufructs to others is "Waqf". According to him, therefore, Waqf does not become absolute, rather conceiving the property itself to be in the ownership of the Waqif and making propitiatory offering of its profits to others is in the category of 'lending' (Āriyat).

The Waqf's propitiatory offerings according, to Imām Abū Hanīfah, being in the category of lending, the "Wāqif", in his lifetime, is entitled to revoke it or to make a gift of it to others or to sell it off till the Waqf does not become absolute. According to him the "Waqf" shall become absolute only when the order of a Government official confirms it (or where the Waqf takes effect through will). According to him, therefore, the Waqf shall not be absolute as long as the order of a Government official is not passed (or it is not created through will) and till such time the Wāqif may deal with the said property in the manner he likes.³

Muhammad's View :

According to Imām Muḥammad Al-Shaybānī, a Waqf shall become absolute on fulfilment of the four conditions noted below :—

1. An Official's order.
2. Delivery of "Waqf property" according to its nature.
3. If contingent on death, the occurrence of death.
4. Creating "Waqf" in the manner, "I dedicate such and such property as Waqf in my life and after my death and for ever."

Abu Yusuf's View :

According to Abū Yūsuf, "Taking the corpus of any property out of the ownership of one self, transferring it permanently to the ownership of God

²Ibid.

³Ibn 'Ābidīn, (d. 1252 A.H.): *Radd al-Mukhtār*, Cairo, 1256 A.H., vol. iii, p. 368; Dāmād Āffandī (d. 1078 A.H.): *Majma' al-Anhur*, Cairo, 1327 A.H., vol. i, p. 739; 'Abdullāh b. Maḥmūd (d. 683 A.H.), Cairo, 1951 A.D., vol. iii, p. 40; Ibn al-Humām (d. 861 A.H.): *Fath al-Qadīr*, Cairo, 1356 A.H., vol. v, p. 37.

and dedicating its usufruct to others is "Waqf", although the one in whose favour the Waqf is created may be a rich person". Yet another opinion of Abū Yūsuf is that the person who dedicates his property in Waqf has, after using the word "Waqf", no right of revoking it. Neither can he make a gift of that property, nor can he sell the property nor can it be made the subject of inheritance.⁴

Hence, according to Abu Yusuf, "Waqf" becomes complete simply by the use of that word alone; decree of an official or the possession by a "Mutawalli" is not necessary. However, so far as creation of a 'Waqf' is concerned there is consensus on the verdict of Abu Yusuf and same is the general accepted practice.⁵

Other Opinions :

There is a difference among the Imams as to whom the ownership of the corpus of "Waqf property" belongs. Abu Hanifah holds that the dedicator of Waqf property is its owner whereas the Ṣāhibayn (Imams Muhammad & Abu Yusuf) and other Hanafi jurists hold God to be its owner. According to Mālikis the proprietorship is that of the dedicator of the "Waqf Property". Shaikh Ibn Humām, an eminent Hanafi jurist has in his book, *Fath al-Qadīr* adopted the same view. With respect to the ownership, the opinion of Shafī'ī is said to be in accord with that of the Ṣāhibayn while the Hanbalis hold that ownership is that of the beneficiaries.⁶

Shi'ah Fiqh :

Najm al-Din Abu Jafar Al-Hilli, the author of *Shrai' al-Islam* writes about Waqf : "Waqf is a covenant that gives rise to the reservation of the corpus of a property and the letting out its profits"⁷ (i.e. Detaining the

⁴Al-Haskafī, 'Ala al-Dīn (d. 1088 A.H.): *Al-Durr al-Mukhtār*, (o. m. o. *Radd al-Muhtār*), Cairo, 1256, vol. iii, p. 369; Dāmād Affandī: op. cit., vol. i, p. 739; Ibn Nujaym (d. 970 A.H.): *Bahr al-Rā'iq*, Cairo, 1311 A.H., vol. v, 212; Shykh Nizam al-Din: *Farawā 'Alamgīrī*, Kanpur, vol. ii, p. 315; Ibn al-Humām: op. cit., vol. v, p. 40; Shafī' al-'Ānī: *Aḥkām al-Awqāf*, Baghdād, 1960 A.D., p. 11.

⁵Ibn 'Ābidīn: op. cit., vol. iii, pp. 372-75; Shykh Nizam al-Din: op. cit., vol. ii, p. 315; Ibn al-Humām: op. cit., vol. vi, pp. 40-44; Shafī' al-'Ānī: op. cit., p. 10; *Al-As'āf*, Cairo 1292 A.H., p. 9.

⁶Ibn al-Humām: op. cit., vol. v, p. 40.

⁷Al-Hilli, Najm al-Din (D. 474 A.H.): *Sharā'ī' al-Islām*, Tehrān, 1377 A.H., p. 152:

“الوقف عقد ثمرته تحبب الأصول وإطلاق المنفعة”

property and releasing its usufruct). But this, in fact, cannot be said to be definition of "Waqf"; rather a few of its ingredients have only been mentioned therein, because the word "*habs*" (Detention) is general and not indicative of permanent dedication. It shall, therefore, be correct to say thus, "Waqf is a covenant under which the corpus of the property is detained permanently and its usufructs are applied to any charitable, religious or pious purpose."

Though according to most of the Hanafi jurists the property so dedicated becomes the property of God, according to Shi'ah jurists, however, the Waqf shall revert to the heirs of the Waqif.⁸

Definition of "Waqf" in the Waqf Act :

The definition of "Waqf" in Section 2 of the Musalman Waqf Validating Act, 1913 has been given as follows :—

"Waqf" means the permanent dedication by a person professing the Musalman faith of any property for any purpose recognised by the Musalman law as religious, pious or charitable."

This Act applies to all the previous Waqfs created prior to or after the enforcement of this Act. The Judicial Committee has, regarding this definition, held in a case that Waqf has been so defined for the purposes of this Act. It is not necessarily an exhaustive definition of "Waqf".⁹

The thing which is dedicated by way of "Waqf" must be of value, for instance, immovable property (land, building etc.) or such movable property the dedication of which by way of "Waqf" must have become a general practice.¹⁰ According to the Waqf Act, however, all kinds of property may be dedicated by way of Waqf. Hence, according to it, every movable property too may be dedicated by way of Waqf, whether or not it is customary to do so. Therefore money too, according to the Waqf Act, may be dedicated by way of Waqf,¹¹ which according to Zahiriyyah as well is valid.¹²

⁸Ibid, p. 154; '*Urwatul Wusqa*, Tehran, 1377 A.H., vol. ii, p. 195:

"فهل يرجع الى وريثة الواقف او وريثة الموقوف عليه او يصرف الى وجوه البر، اقوال، اقواها ما بل المتعين الرجوع الى وريثة الواقف حسب ما مر من التحقيق"

⁹*Mami v. Qalandra Mal*, 1927, 54 I.A. 23, 27 = AIR 1927, P.C., 22.

¹⁰Ibn 'Abidin: op. cit., vol. iii, p. 370.

¹¹PLD 1958, Lah., 824.

¹²Ibn Hazm, Abu Muhammad (d. 456 A.H.): *Al-Muhalla*, Cairo, vol. vi, p. 214.

Purpose of Waqf :

As for the purpose and motive with which a Waqf is created they should only be those as are recognised by Muslim Law to be religious, pious or charitable.¹³

Permanency of Waqf :

See Section 205 (8) and its commentary.

Pakistan Rulings :

Creation of Waqf, no fixed formula, intention to create and appointment of 'Mutwalli' is sufficient for creation of Waqf : "In Muslim Law there is no set formula for creating Waqf. The only requirement is a clear intention of creating a Waqf and a declaration by the *Waqif* to that effect and the appointment of a "Mutwalli". (PLD 1967 Lah. 1221, DB).

Creation of Waqf, intention of maker to be looked to, no written or oral dedication, long user of property may raise presumption of dedication : The Supreme Court of Pakistan in a case held : "If it is accepted, as indeed it is, that the shrine has been in existence, from 1666, then the unrestricted public user of the place for more than 300 years is, in our opinion, quite sufficient to presume a dedication. The law, no doubt, looks to the intention of the dedicator but where he is dead and has left behind no document or written word from which his intention may be gathered, it would be permissible to look to his conduct, the conduct of his successors-in-interest, the nature of the object sought to be achieved and the kind of institution set up for that purpose and the manner of its user since. If a man builds a mosque on his own land and permits the public to use it as a place of worship and it continues to be used as such even after his death for a sufficiently long time, then the only inference possible is that he intended to dedicate this land for the purposes of a mosque. To establish a Waqf it is not necessary to use any particular kind of words or to adopt any particular form of transaction. If the founder of the institution suffers the members of a particular community or the public at large to use a premises without interruption for a religious or pious or charitable purpose for any sufficient length of time, then under the Shari'at Law dedication will be presumed. Thus where the shrine is of a Saint, *pir*, or other venerated holy person and it has from time immemorial been treated as a place of pilgrimage by devotees who are accustomed to perform or participate in religious ceremonies performed there, then it will be difficult to resist the

¹³Shykh Nizam al-Din: op. cit., vol. ii, p. 297.

inference that the place has been dedicated for such a purpose.” (PLD 1971 S.C. 401).

Offerings made at shrines are ‘Waqf’ property : It cannot be seriously denied that offerings made at the shrine which are primarily intended by the donors for charity and alms is Waqf according to pure Muslim Law. (PLD 1966 (W.P.) Lah. 978, DB).

Subject of ‘Waqf’ must be property of Waqif at time of creation of ‘Waqf’; subsequent acquisition of property by ‘Waqif’ does not validate ‘Waqf’ : Under Muslim Law, both Hanafi and Shi’ah schools, it is a condition that the property dedicated should belong to the *Wāqif*, otherwise Waqf is not valid. Even subsequent acquisition of such a right will not validate it unless the proprietor also ratifies. Where, therefore, a mosque had been put up unauthorisedly on a plot of land by an Anjuman before that piece of land had been transferred to the Anjuman, it was held that it could not be contended that the mosque already constructed could not be demolished or put to any other use. (PLD 1969 S.C. 223—21 DLR (SC) 225.)

Self-acquired property of ‘Chela’ is not ‘Waqf’ because it devolved on ‘Chela’ from ‘Guru’ : It was held by Lahore High Court: “It is too late in the day to contend that a self-acquired property of a *Chela* should be considered to be a religious property merely from the fact that its course of devolution has been from *Guru* to *Chela*. The case will have to be considered from an overall point of view.” [1971 Law Notes (NUC) 6 (Lah.)].

Trust and ‘Waqf’ distinction between, ‘Waqf’ property cannot be given over to trust : “A trust is always for the benefit of its author and it does not exhaust the trust property, while in a Waqf, a charitable purpose is always presumed and the cypres doctrine is applied. The Waqf property does not vest in the trustee. A Waqf property cannot be given over to a trust. It is dedicated to God and its handing over to trust cannot be permitted because the trust is always for the benefit of particular beneficiaries”. (PLD 1972 Lah. 780.)

‘Waqf’ by long user when may be presumed : To presume Waqf by long user, the user must be of such an unequivocal nature which can only lead to an inference of dedication of property and to no other inference. It should be adequate, consistent and of sufficiently long duration. [Law Notes 1971 (UNC) Lah. 6.]

‘Waqf’, nature of—beneficiaries are not owners of property, position of beneficiaries and ‘Mutwalli’ explained : All that happens in a Waqf is that

the Waqf ties up the corpus in the name of God making Him its owner and creates limited interests in its usufruct in favour of various persons. These persons in whose favour such limited interests are created are called beneficiaries. The beneficiaries are not owners or part-owners of the corpus of the property. No property vests either in them, or in the *Mutwalli*. The *Mutwalli* is only a Manager and a procurator of the property and cannot be called an owner of the corpus of the property. (PLD 1970 Lah. 341, DB).

‘Waqf’ property cannot change its character by being called by another name, ‘Waqf’ property identified as such is ‘Waqf’ : Under Muslim Law the incontrovertible principle is : “Once a Waqf always a Waqf, if the Waqf properties can be traced and indentified”. A Waqf cannot change its character as a Waqf merely because it has sometimes been described by another name. If any person can lay his finger at a property to be a Waqf, it shall continue to remain as Waqf as long as it can be identified. (PLD 1967 Dacca 1—18 DLR 52, FB).

‘Waqf’ may be created through agent by ‘Waqif’ : It was held in a case by the Lahore Bench of the High Court of West Pakistan that Waqf may be created by the Waqif through his agent. (PLD 1967 Lah. 1221 DB).

Mosque on usurped land : Muhammadan Law—Mosque—Muslim Law (both Hanafi and Shi’a) property dedicated should be Waqif’s own, else Waqf is not valid. Mosque cannot be constructed by usurping land of another. Even user of such mosque would be unauthorised and irreligious. Body of persons trespassing upon land vested in Government and building thereon a mosque and a madressa, the act of members of Anjuman in occupying land was held as “*Ghasb*”, strongly condemned both in Holy Qur’an and *Hadith*. (PLD 1973 Lah. 500, DB).

Mixed Waqf, division of : The preponderance of the opinion is in favour of dividing a mixed Waqf into the private trust portion and the public trust portion and to apply the law applicable to public trust or mixed trust at least to portion which is in the nature of a public trust. It appears, however, that there is one condition attached to it that the substantial portion of the dedication should be to public purpose. In the present case the two portions are easily divisible and the portion of dedication to charity is substantial. The Waqf otherwise will be valid even if no reference is made to the Waqf Act of 1913. This is an additional reason for holding that it was not in fact within the ambit of that Act and at least the portion given to charity can be treated as public Waqf by itself. (PLD 1975 Lah. 1147).

Trust and Waqf—distinction between: A Division Bench of the High Court of Lahore in a case has clearly laid down distinctions between a Trust and a Waqf as under : “It is well settled as laid down by their Lordships of the Supreme Court in Jubendra Kishore Achharrya Chowdhury and others v. The Province of East Pakistan and others (PLD 1957 SC 9) that Waqf in Muhammadan Law is a religious institution. It is to be noticed that a Waqf in Muhammadan Law differs from a Trust in the manner as is shown in the following table :—

<i>Trust</i>	<i>Waqf</i>
1. No particular motive is necessary.	1. It is generally made with a pious, charitable or religious motive.
2. The founder may himself be a beneficiary.	2. The Waqif cannot reserve benefit for himself except to some extent under Hanafi Law.
3. It may be for any lawful object.	3. The ultimate object must be some benefit of mankind.
4. The property vests in the trustee.	4. The property vests in God.
5. A trustee has got a larger power than a Mutawalli.	5. A Mutawalli is only a Manager or superintendent.
6. It is not necessary that a Trust must be perpetual, irrevocable or inalienable.	6. A Waqf is perpetual, irrevocable and inalienable.
7. It results for the benefit of the founder when it is incapable of execution and the property has not been exhausted.	7. The cypres doctrine is applied and the property may be applied to some other object.
8. It is regulated by Trust Act.	8. Rules regulating Trust cannot be applied to Waqfs. Muhammadan Waafs are governed by special provisions of Muhammadan Law applicable to it.

Section 204. (1) A Waqf may be created by every such word Words Constituting Waqf that is legally used for creating a Waqf.

(2) If any Muslim owner of property which is in his possession admits it to be Waqf property it will be presumed that it is such property.

(3) The Admission of "Waqf" by a sick person (in a state of death-illness) shall be valid to the extent of one-third (1/3) of his property left by him at the time of his death.

Explanation : For the creation of "Waqf" it shall not be essential to use the word of "Waqf" only.

COMMENTARY

The essential factor in the creation of a Waqf is the intent and purpose of the Creator of Waqf. For the expression of the intent and purpose, the adoption of every such word may be relied upon which is used for the creation of "Waqf". Hence, the use of the word "Waqf" only in the context is not essential.¹⁴

Ibn Nujaym in his noted work '*Bahr al-Ra'iq*' has given twenty six words in connection with the creation of a "Waqf". Some of these words are given below :—

Sadqah (alms dedicated to pious use : Propitiatory Offering), *Mawqufah* (the property dedicated in Waqf), *Mahbusa* (property seized in Waqf), *Habs* (property confined), *Fi Sabil Allah Waqf* (property dedicated in the name of God).^{14a}

"Words that are legally in use for Waqf" mean that the words that give a general sense of permanency of dedication shall be competent to constitute "Waqf" and the law shall, in general, take the words to mean "Waqf".

The kinds of words constituting Waqf :

Words constituting Waqf are of two kinds : One of them is *Explicit*, "Manifest" and the other is "Metaphorical". The word of Waqf that is explicit does not admit of any consideration of presumption or intention. But where the words are metaphorical, presumption and intention have to be relied upon in order to ascertain the meaning and intent of the dedicator of Waqf.

Examples :

If some one declares a "Waqf" in these words: Some part of my certain land is dedicated in "Waqf" and says no more, the Waqf shall not be valid. If however, he says : Whatever is my share in this land or

¹⁴Al-Haskafī: op. cit., vol. iii, p. 372; Shafiq al-Ānī: op. cit., p. 18.

^{14a}Ibn Humām; op. cit., vol. v, (*Kitāb al-Waqf*).

shop is dedicated in "Waqf" or says, "My share in this entire house which is one-third (1/3) is dedicated in "Waqf", but it is later found that the share is one-half (1/2), the entire one-half share shall be considered to be validly dedicated in "Waqf".¹⁵

If a person uses these words: "I give away this land of mine in propitiatory offering (sadaqa) to poor and paupers", it shall not create a Waqf. If he has definite intention to do so it shall be conceived to be a present made of the property with the intention of making propitiatory offering. If a particular person is named therein, it shall be a propitiatory offering by way of settlement of property in favour of that person and, like sadaqa, as long as its possession is not made over the propitiatory offering shall not be complete.

If a person says, "My house is for your residence", it shall apparently be a licensing out (*ḍariyat*) of the house. If the donor says, "This house is a propitiatory offering as Waqf for the poor and pauper", and taking it out of his possession gives it over in possession of a "Mutawalli" so that he may take care of it and get it repaired from its income, get its drainage system improved, manage its agricultural field, and save so much from its income that it may be spent in time of need on the requirements of those fields and whatever is left over of that income may be spent every year on the poor and pauper, then the Waqf shall be properly and validly created.¹⁶

Shi'ah View :

According to Shi'ah jurists the meaning of the word "Waqf" is manifest and definite. The word being manifest in its meaning is by itself a proof, whether one does intend a "Waqf" or not, because the word itself is definite in the meaning of "Waqf". By other words that are not manifest in their meaning and are used for "Waqf" as well as other relevant circumstances shall be taken into consideration for constituting a waqf.¹⁷

Pakistan Rulings :

Writing not Necessary : For Waqf a written document is not necessary. A property which is being used as "Waqf" may also be proved to be Waqf.¹⁸

¹⁵Ibn Nujaym: op. cit., vol. v, p. 203; Ibn 'Ābidīn: op. cit., vol. iii, p. 371.

¹⁶Al-Sarakhsī: op. cit., vol. xii, p. 32.

¹⁷Al-Hillī: op. cit., p. 152.

¹⁸PLD 1961, Lah., 993; *Al-Majallah*, legal Maxims :

“الأصل بقاء ما كان على ما كان” - “القديم يترك على قدمه”

Egyptian Law :

The "Egyptian Law for the Management of Waqf, 1946" has made it essential for the creation of Waqf that it be in writing.

Section 205. The following are essential conditions for the validity of Waqf :—

- (1) The Waqif (Creator of Waqf) must be prudent, major and free.
- (2) The Waqif (Creator of Waqf) must not be precluded from creating a Waqf at the time.
- (3) The Waqif (Creator of Waqf), at the time, must be the owner of the property dedicated in Waqf.
- (4) The declaration of Waqf must be made voluntarily and in good faith.
- (5) The creation of the Waqf, except by a will, must be immediate and must not depend upon a condition unless that condition is present or is certain to be present in future.
- (6) The property dedicated in Waqf must be known and specific.
- (7) There is no intention of sale or gift of that property.
- (8) The Waqf must be permanent.

COMMENTARY

Different conditions for the validity of Waqf have been prescribed for all the three: (i) the dedicator or creator, (ii) the property dedicated in Waqf and (iii) the beneficiaries of the Waqf.

Legally, only that person is held capable of expending his assets and possessions who is prudent and major. Thus every Muslim who is prudent and major has the right of dedicating his assets in Waqf. In other words, a Waqf created by a minor or an insane person shall not be valid. But if a person is barred from expending his assets on the ground of his being an idiot and he dedicates his assets in Waqf for meeting his expenses during his lifetime and for charitable purposes after his death, then according to an

authentic opinion reported of Abu Yusuf, such a Waqf shall be valid and if the Waqf is in writing the Waqf shall be valid.¹⁹

Ownership essential :

Property dedicated in Waqf, at the time of its dedication, must be in the ownership of the dedicator. Dedication of the Waqf property, not in dedicator's possession as owner, shall not be valid.²⁰ Consequently if a person after purchasing a land from another person dedicates it in Waqf, thereafter a third person proves that the land did not belong to the seller the dedication would be void although a mosque might have been built upon that land. Similarly if after the dedication of a property in Waqf, someone claims his right of pre-emption over it and proves his claim, its dedication in Waqf shall *become* void, although the same might have been converted into mosque.²¹ The dedication in Waqf of a land as well shall not be valid which on account of arrears of revenue is made over to the Government for the realisation the same from the income of that land.²²

Proposal or declaration of Waqf :

According to Hanafis, a Waqf, contrary to general contracts, comes into being by mere proposal or declaration of the dedicator of his property in Waqf. Acceptance is not a condition for its propriety or validity. Hence acceptance is not essential as a condition for the creation of Waqf or for the rights being created therein whether the beneficiaries be known and limited in number or unknown and unlimited. This is also the rule with the majority of Maliki and Hanbali jurists. The Shafi'ī's, in certain cases, hold acceptance to be a necessary condition. The Shi'a jurists, in case of a known beneficiary, hold acceptance to be essential.²³

Pakistan Rulings :

In fact, the mere declaration of creation of Waqf by the dedicator of property is enough for the completion of a perfect and valid Waqf. It is

¹⁹Ibn Nujaym: op. cit., vol. v, p. 203; Ibn 'Ābidīn: op. cit., vol. iii, p. 370; Shykh Nizam al-Din: op. cit., vol. ii, p. 315-16; Ibn al-Humām: op. cit., vol. v, p. 38.

²⁰Ibid.

²¹Ibid.

²²Ibid; Al-Khassaf (d. 261 A.H.): *Aḥkām al-Awqāf*, Cairo, 1322 A.H. p. 35.

²³Al-Maqdisi, Ibn Qudamah (d. 620 A.H.): *Al-Mughnī*, Cairo, 1367 A.H., vol. v, p. 546-47.

not essential that the possession of the Waqf property should also be made over to the Mutawalli. If the dedicator of the Waqf property has voluntarily and in good faith dedicated the property in Waqf by divesting himself of its proprietary rights, it shall be a valid Waqf.²⁴

Abu Yusuf and Al-Shafi'i's View :

According to the assertions of Abu Yusuf and Al-Shafi'i the Waqf for its completion does not stand in need of possession of property being made over. About this, there is a difference of opinion among the Mālikīs. Some of them hold that making over its possession is a condition, and the others say that it is not. Ibn Qudamah al-Maqdisi al-Hanbali has written in his book, *Al-Mughni* that in Waqf what is definite is the divestment of the proprietary right of the dedicator of property in Waqf. Waqf becomes perfect by mere use of the word "Waqf", because the object of Waqf is realised by the word "Waqf". According to another narrative of Ahmad Ibn Hanbal, Waqf is not completed without possession of its property being made over.²⁵

Other Views :

Muhammad Al-Shaybani, Abd al-Rahman b. Abi Layla, Mālik b. Anas and the Shi'ah Imamiyah hold the transfer of possession a condition essential for the completion and perfection of Waqf.

The matter of the possession of Waqf property may be considered in two contexts. One, when the possession of Waqf property is with the dedicator himself and the other, when its possession is made over to another. In the first case, the Waqf property may remain in possession of the dedicator himself, if he is the Mutawalli and retains possession of the Waqf property as a *Mutawalli* instead of as the owner. In the second case, if another person is being appointed a *Mutawalli*, it is essential that its possession is made over to the *Mutawalli*. The real object of making over its possession is to nullify the proprietary right of the dedicator in the Waqf property. In certain circumstances, after a Waqf is created, the very act of creating Waqf by itself fulfils the condition of nullifying the proprietary right of the owner and there remains no necessity of making over its possession to another. For instance, a person, after dedicating his land in Waqf for a graveyard, allows the Muslims to be buried therein and the people once or more than once perform the act of burial therein, the dedicator, thereafter, has no right to revoke that dedication. This is so, because the

²⁴PLD 1952, Dacca, 206.

²⁵Al-Maqdisi: op. cit., vol. v, p. 546-47.

jurists who hold the possession of Waqf property by *Mutawalli* a condition for the validity of the Waqf have their object, in the above case, fulfilled by the act of such burial. Likewise if a person gets an inn constructed and one or more than one travellers stay therein, the dedicator of that property shall have no right of revoking the Waqf, because the travellers, staying therein shall be considered to be making over possession of that dedicated property.

Those who hold transfer of possession to be a condition for the completion of Waqf consider that there are two methods of transfer of possession. One is that the dedicator makes over the possession of the property dedicated to the *Mutawalli* to be dealt with by him. The other is that the purpose of Waqf is carried out by the acts of the beneficiaries.

Al-Sarakhsi in his book "*Al-Mabsū*" says that if a person dedicates his land for the construction of a mosque for the use of general public and after such construction he, alienating it from his proprietorship, allows the general people to say their prayers therein and the *Mu'azzin*, gives the call to prayer and the people collectively say their prayers therein, though the same may be even for once, the dedicator has no right to revoke the dedication and after the death of the dedicator the property shall not be included in his estate. For, whatever is reserved for God cannot be recalled validly, like a propitiatory offering. According to Abū Yūsuf, however, when the dedicator alienates the Waqf property from his proprietorship and allows the people to say their prayers therein, the Waqf shall at that very moment become perfect though actually the prayers may or may not have been offered therein for, according to him, the Waqf becomes complete by the personal act of the dedicator himself. Making over its possession to *Mutawalli*, consequently, is not a necessary condition. But according to Muhammad al-Shaybani, in the circumstances stated above, the Waqf shall not be perfect till the people do not collectively offer their prayers therein as, according to him, committal to a *Mutawalli* is essential. Two rulings on this question are related from Abu Hanifah. According to the narrative reported through Hasan Bin Ziyād it is essential that the collective prayers be performed therein. But according to an assertion received through other persons, even if a single individual performed his prayer therein the piece of land shall become a mosque although prayers may not have been offered there collectively. The basis of the report of Hasan Ibn Ziyād is that propitiatory offering gets completed when its purpose is completely implemented. The purpose of the construction of a mosque is that collective offering of prayers be held therein. It is this distinctive feature that distinguishes a mosque from a piece of open land where prayer can be (or has been)

offered. The only purpose of constructing a mosque is that the prayers be offered collectively. Hence, so long as the purpose is not served the mosque is not a mosque. The basis of the second ruling is that literally the word Mosque, means 'a place where the forehead is bowed in prayer touching the ground.' This purpose is served even by the offering of prayers of a single person. As, in case of general rights of Muslims, a single Muslim is considered to be the representative of the whole community of Muslims, the offering of the prayers by a single Muslim shall be considered to be the offering of prayers by the whole community of Muslims.²⁶

Imam Sarakhsi, after explaining the point of view of Abu Yusuf and Muhammad on the question of possession and stating the assertion of Qaḍi Abu 'Āsim, has ruled that in essence the viewpoint of Abu Yusuf is more weighty.²⁷

Waqf—immediate, not contingent :

It is essential that the Waqf be immediate and be not based upon an uncertain condition. The Waqf, which is created through will, shall not apply to more than one-third (1/3) of the legacy except where after the death of the dedicator, his heirs give their consent.²⁸

Waqf must be unconditional :

In the creation of Waqf, a condition that nullifies the Waqf, as sale or gift, must not be laid down.²⁹

Property—existing and specific :

It is essential that the property which is intended to be dedicated in Waqf must be known and existing. Dedication in Waqf of a property which is unknown or unspecified cannot be valid.

The things that are attached with the Waqf property like land, building or garden shall, without their details being mentioned, be included in the Waqf. But movable articles that are not attached with the Waqf property shall not, without their details being mentioned by the dedicator at the

²⁶Al-Sarakhsi: op. cit., vol. xii, p. 34.

²⁷Ibid, p. 36.

²⁸Shykh Nizam al-Din: op. cit., vol. ii, p. 315; Ibn 'Ābidīn: op. cit., vol. v, p. 497.

²⁹Al-Haskafī: op. cit., vol. iii, p. 370; Ibn 'Ābidīn: op. cit., vol. iii, p. 370-71; Ibn Nujaym: op. cit., vol. v, p. 203; Shykh Nizam al-Din: op. cit., vol. ii, p. 315-16.

time of Waqf, be included in the Waqf, for instance, agricultural tools, seeds, animals etc.³⁰

Permanency of Waqf :

The majority of jurists hold the perpetuity of Waqf to be a condition for the validity of Waqf. A Waqf which is temporary or is for a fixed period is void, because the object of Waqf is everlasting act of virtue which is realisable only by means of permanent dedication.

Al-Shafi'i and Ahmad Ibn Hanbal hold perpetuity to be a condition for the validity of Waqf. Muhammad Al-Shaybani holding the permanency of Waqf to be a condition is strongly of the view that the fact of perpetuity must be specified. Abu Yusuf too holds the permanency of Waqf to be a condition but as against Imam Muhammad he does not hold such positive averment to be a necessary condition. He argues that the perpetual nature of the transaction is inherent in the word 'Waqf'.

The Zāhiriyyah, too, like the majority of jurists, are convinced of the permanency of Waqf. Imam Ibn Hazm has in his work. "*Al-Muhalla*" expressly laid down that if a person dedicates his property in Waqf and puts a condition that he in time of his need may sell the property, the waqf shall be valid but the condition shall be void.³¹

Imams Abu Hanifah and Malik, as against the overwhelming majority of the jurists, do not hold the permanency of Waqf to be a necessary condition for the validity of Waqf; rather they hold the Waqf for a period only to be valid. Likewise, they hold that in a Waqf the condition for sale too in time of need is valid. Some Shi'ah jurists as well agree with this view.

The controversy as to perpetuity : There are two groups of jurists who differ on the question of permanency of Waqf. The first group is convinced of the permanent nature of dedication in Waqf and does not consider a Waqf for a period to be valid. This group includes Hanifis, Shafi'is, Hanbalis and Zāhiris. Whereas the other group which holds a Waqf for a period also as valid includes Malikis and some of the Shi'ahs. Among Hanafis, Abu Hanifah, favours permanency to be no condition. The arguments of different school of fiqh are given below :

Imam Shafi'i's View :

Imam Shafi'i is fully convinced of the condition of permanency for a Waqf without any limitation of period. However, in case a person in the

³⁰Ibn 'Ābidīn: op. cit., vol. iii, p. 384; Ibn Nujaym: op. cit., vol. v, p. 216; Shykh Nizam al-Din: op. cit., vol. ii, p. 318.

³¹Ibn Hazm: op. cit., vol. ix, p. 183.

dedication of Waqf specifies a mode of disposal which by nature is bound to become extinct, Imam Shafi'i has expressed two opinions : The first is that such a Waqf is void, because the object of creating a Waqf is to attain a permanent virtuous reward, and in such a Waqf this object is unattainable. The second is that the Waqf is valid and after the specified mode of disposal is extinct, the poor and needy shall be the beneficiaries of the Waqf; but the poor and needy among them who are the relatives of the dedicator of Waqf shall get preference.³²

Ahmad Ibn Hanbal's View :

Similarly, according to Ahmad Ibn Hanbal, the permanency in Waqf is a necessary condition. Ibn Qudama al-Maqdisi has, in his book, said that if a dedicator in Waqf places a condition that he may, whenever he wishes, sell the Waqf property or make a gift of it or have recourse to it, in all such events neither the condition nor the Waqf shall be valid, because such a condition is contrary to the purpose of a Waqf. If, however, such a disposal is prescribed in the Waqf which shall in due course become extinct, the Waqf shall be valid; and on the disposal (disbursement) becoming extinct the income from the Waqf property shall be spent on the relatives of the dedicator of Waqf.³³

Hanafi Doctrine :

Excepting Abu Hanifah, the Hanafi Imāms particularly Imām Muhammad strongly believe that the condition of permanency of Waqf is mandatory. According to Muhammad Al-Shaybani, it is incumbent that there ought to be such words in the writing of the dedicator in Waqf deed that must, at least implicitly indicate permanency. Hence, he has said that if the declarant of Waqf specifies the permanency of Waqf but states its such disbursement which must discontinue and be inconsistent with perpetuity the Waqf shall yet be invalid. Imam Abū Yusuf agrees with Imam Muhammad about the 'condition of permanency' but he considers the word 'Waqf' to be sufficient indication of the permanency of Waqf. Hence if the dedicator of Waqf specifies such disbursement that must come to an end the Waqf, according to Abu Yusuf, shall be valid and the Waqf by itself shall devolve to the benefit of the poor and needy. Imam Abu Hanifah is, however, not convinced that the Waqf should be permanent.³⁴

³²Al-Firozabadī, Abu Ishāq Ibrahim b. Ali b. Yusuf (d. 476 A.H.): *Al-Muhazzab*, Cairo, vol. i, pp. 417-38.

³³Al-Maqdisi: op. cit., vol. vi, p. 195.

³⁴Ibn Nujaym: op. cit., vol. v, p. 216, *kitab al-waqf*; Ibn 'Ābidīn: op. cit., vol. iii.

Zahiriyyah's View :

According to Zahiriyyah as well the Waqf must be permanent and perpetual. If the dedicator introduces a condition in Waqf it shall be void and the Waqf shall be valid.³⁵

From the above it is clear that most of *A'immah* (Imams) believe in the permanency of Waqf. According to them permanency is one of the components of Waqf which is inherent in the very concept of Waqf.

Maliki View :

Indeed, Imam Malik as opposed to the views of a large number of jurists, seems to hold a different view about the permanency of Waqf. He is not convinced of the nature of Waqf being only permanent and perpetual. Rather, according to him, as is a permanent Waqf valid so is the Waqf for a fixed period valid. If it is stipulated, according to him, that the dedicator in Waqf is entitled to sell the Waqf property in time of his need the Waqf, with the stipulation as well, shall be valid. Likewise, if it is stipulated in the Waqf that after the death of the person in whose favour the Waqf is made, the Waqf property shall revert back to the dedicator in Waqf (if he is alive), or if he is dead it shall revert to his heirs, that stipulation too shall be valid. In short, according to him, permanent Waqf and Waqf for a fixed period (even though not limited by years) both are valid.³⁶

Shi'ah View :

Some of the Shi'ah jurists as well agree with this ruling of Imam Malik. Hence, according to them 'perpetuity in Waqf' is not a constituent of it. Amongst the Hanafis also there is one ruling reported from Imam Abū Yusuf. Accordingly Ibn Humam in '*Fath al-Qadir*' and Sarakhsi in '*Al-Mabsūf*' have stated that Abū Yusuf in his last ruling had given a wide scope to the question of Waqf, although he was very restrained in his earlier view. Abu Yusuf in the end concluded : "It is no condition for the Waqf to be in perpetuity". Even if a person creating a Waqf provides for such expenditure that terminates yet, according to him, the Waqf shall be valid though the same might not have been directed ultimately to go to the poor and needy. He argues that the purpose of such act is to gain nearness to

³⁵ Ibn Hazm: op. cit., vol. ix, p. 183.

³⁶ Abdul Samī' Al-Abī : *Jawahar al-Aklīl*, Cairo, 1947 A.D., vol. ii, p. 307-8.

God. As this purpose is served by declaration in perpetuity, similarly the purpose is served by adopting a method which may not be perpetual.³⁷

Fath al-Qadir records a report from Muhammad b. Muqātil that it has been stated by Abu Yusuf: "If a person dedicates a Waqf to some one, the Waqf shall be valid, but on the death of the one to whom it is dedicated the Waqf property shall revert back to the heirs of the dedicator. There is a verdict (fatwa) on this assertion". It is thus proved amply that there shall be no harm done to the Waqf even if a period is fixed therein.³⁸ Therefore Abu Yusuf too does not hold "perpetuity" to be an integral part of Waqf. Some jurists have based their verdict on this latter verdict. But the former verdict of Abu Yusuf has judic sanction and general practice is based on the assertion which supports perpetuity.

It now seems proper that the arguments of both the parties be set down here so that it be easier to understand their points of view.

Arguments for perpetuity of Waqf :

The argument of those who consider the perpetuity of Waqf to be its inherent feature is based on the tradition of Haḍrat 'Umar whose words are :—

(a) "حبس الأصل"

(b) "لا يباع ولا يوهب ولا يورث"

(c) "حبس مادات السموات والارض"

All these words signify "perpetuity". The word "*ḥabs*" (confinement or restriction) in Arabic signifies perpetuity. If a Waqf is, however, held to be reversible there remains no meaning of the word "*ḥabs*". Further, fixing a period in Waqf is against the meaning of that word. Hence, the Prophet's saying, "Restrict or confine real property" is a propitiatory offering of a kind that shall continue in perpetuity till the world exists or may exist.

And the words, "لا يباع ولا يوهب ولا يورث" i.e. "It should not be sold, neither should it be given away in gift, nor should it be turned into heritage", are indications for conveying the meaning of perpetuity, in as much as if a period is fixed for Waqf, after the expiry of that period its sale, gift or inheritance shall all necessarily follow. Similarly "حبس مادات السموات والارض" too is a perfect manifestation of the perpetuity of Waqf. Now, there remains no need of any other proof. These words of 'Umar were

³⁷ Al-Sarakhsī: op. cit., vol. xii, p. 41.

³⁸ Ibn al-Humām: op. cit., vol. v, p. 48.

used by him at the time of his creating the Waqf with the purpose of conveying the sense that perpetuity in Waqf is the intrinsic part of the meaning of Waqf.

Besides this, all the traditions and reports that have reached us concerning Waqf from the Companions of the Prophet (peace be upon him) clearly prove that for a Waqf it is essential that it be unconditional and absolute of which perpetuity is a corollary. There is no indication in their statements that may show the propriety of fixing a period in Waqf. The fact that stands proved from Shari'ah is that permanency of transfer in Waqf is its essential ingredient and fixing a period in Waqf is contrary to and against the meaning and essence of a Waqf.

A dedicator of property in Waqf alienates his proprietary rights in the property. In all religious tenets the alienation of a property or a right is valid when such alienation is absolute and unfettered. It shall not be valid with any time-limit. It is thus clear that Waqf cannot be fattered by time. It shall be valid only when it is permanent. Permanency or perpetuity of Waqf is inherent in its very meaning.

Arguments for validity of non-permanent Waqf:

Those who are convinced of the validity of Waqf both permanent and for a fixed period argue that Waqf, with respect to its reality and purpose, is a propitiatory offering. As propitiatory offering with condition of permanency is valid so is the Waqf too with condition of an appointed period valid. There can be no argument to the effect that permanent propitiatory offering may be considered to be valid, whereas the same for an appointed period shall not be considered to be valid. Creating a difference between the two is neither proved by any revelation nor is supported by the Qur'ān or by Tradition. Validity of propitiatory offerings stand positively proved from both the Qur'ān and the Tradition. Irrespective of authority, making a beneficial transfer is a pious act. Traditions speak of more than one method of charitable spending or transfer. One method is that the income of a fixed property be spent on alms dedicated to pious uses and then it be continued to be spent permanently at appointed stages or till an appointed time at particular occasions. The other method is that a needy person is made the master of the corpus of the property which is dedicated to pious uses. All these methods are included in the general method of dedication to pious uses. Hence, holding some of these methods to be correct and others incorrect cannot be proper.

As regards the tradition stated by 'Umar the latter group maintains that the tradition at best proves that confining the corpus of

a property in perpetuity and dedicating its income and produce in perpetuity to pious uses in also a method of charity or beneficial spending as it has been made evident by the Shari'ah; and on the basis of *Qiyās* as well the method of burdening a property for an appointed period and spending its income on acts of charity for a fixed period is sound. The real factor is that the property be put to charitable uses, and this factor is present in both the perpetual and non-perpetual Waqf.

The 'Ulama who hold Waqf for a period as valid also agree that though such words that express the permanency of Waqf do occur in the statement of 'Umar, but there is nothing in his statement that denies the non-permanency of Waqf. Rather, the substance of the entire statement is that in the event of there being a clarification by the dedicator in Waqf to the effect that Waqf shall be absolute it shall be incumbent to put the same into effect as a permanent Waqf. How it is argued that if this is not done the Waqf shall not be valid. In support of this view it is urged that the Prophet at the beginning of the tradition used the words, 'If you want' the use of these words by the Prophet at the beginning of his statement is a proof that detaining the dedicated property in Waqf depends upon the will and intention of the dedicator. And what the Prophet advised does not show that this one method alone of creating Waqf has been approved by him and that no other method is possible or that no other method may be adopted. Again, there is no difference as to the use of the words *habs* (detention) by the Prophet. But it does not prove permanency because as it is possible to detain or confine permanently so it may be done temporarily. The rest of the words proving permanency are the words of 'Umar himself. This tradition itself is only a proof that 'Umar used these words and the Prophet let these words stand. This, however, does not prove that other than this method shall not be valid.

By holding "Waqf for a period" to be valid it does not necessarily follow that a matter has been held to be valid for the validity of which there is no authority in Shari'ah. This is so because "Waqf for a period" is a propitiatory offering and any propitiatory offering becomes absolute in implementation in the same manner as the dedicator makes the offering. Moreover, the validity of Waqf for a period stands proved by *Qiyās* as well. Rather its validity compared to that of permanent Waqf is better established.

Another argument of the group that considers "permanency" a condition for Waqf is: "in Waqf the dedicator relinquishes his proprietary right from the property dedicated by him making another person

its proprietor. Such matters are by nature only valid, if absolute; they are not valid with any limitation of time". But such a view cannot be advanced as an answer to those who are convinced of the non-permanency of Waqf. In fact, Malikis who are convinced of its validity, hold *ab initio* that the proprietary right of the dedicator in the Waqf property continues to exist as of old. Hence, the rule of the lapse of proprietary right cannot satisfy them. A person believing in any particular *fiqh* must be answered only in terms of his own beliefs and convictions.

Recent Views :

Shaykh Abu Zuhra of Egypt has said in his book "*Kitab al-Waqf*"³⁹ that "those who hold permanency to be the inherent attribute of Waqf are in a majority than those who do not hold permanency to be such an attribute. That is, the number of those who hold "Waqf for a period" also to be valid, is substantially small. But the soundness of an opinion is not judged by its being accepted by a large number of individuals; rather it depends on the strength of argument and benefit to the society".

Thereafter, Shaykh Abu Zuhra, quotes the provisions of the Egyptian and Lebanese laws wherein the practice of Imam Malik has been adopted and holds it to be preferable.

Analysis :

There is no doubt that "Waqf" in its intent and purpose is a kind of 'propitiatory offering' but it is of a special kind. 'Zakat', also is an offering of special kind though in its various provisions it is different from the general propitiatory offering. Similarly a Waqf, inspite of being same in intent and purpose, is different in its various provisions from a general propitiatory offering. Propitiatory offering is the genus that includes its different species. There are innumerable different species included in a genus and each of the species has special properties of its own. If several species are included in a genus it is not essential that they be similar in their distinguishing features as well. It is only the main characteristics of a genus that should certainly be found in the species. But the rules with reference to special property of the species might be altogether different from the general rules governing all the species of a genus. For instance, the purpose of propitiatory offerings is to obtain the pleasure of God. This shall be the common feature found in all the species of that genus. The feature is found in "*Zakār*" too and should also be the charactersitic of all kinds of "*Sadaqar*" and "*awqaf*" as well. Inspite of this there are some such features of *Zakāt*, because of its special nature that are not to be found in other propitiatory offerings

³⁹Abu Zuhra: *Al-Waqf*, Cairo, 1959 A.D. pp. 73-81.

(*Sadaqāt*). Such precedents are available elsewhere in Shari'ah. For instance, there are several kinds of '*Haj*' (Pilgrimage) and each of them, in certain peculiarities, is different from the other. Similarly, "*Zakāt*" is obligatory whereas other propitiatory offerings (*Sadaqāt*) are optional. In '*Zakat*' a year's possession is an obligatory condition. In other propitiatory offerings (*Sadaqāt*) there is no such condition.

In voluntary offerings also there may be kinds which though properly included in the genus of *Sadaqat* might have certain peculiarities not to be found in other species. Thus "*Waqf*", although agreeing in genus with "*Sadqah*" in its intent and purpose, might have some such peculiarities of its own. Therefore, it is quite valid that a propitiatory offering without declaring a *Waqf* may be made in respect of the corpus of the property and some other person may be made its proprietor whether he retains it or sells it away. It is also valid that propitiatory offering of a property income be made and the property itself be kept under personal proprietorship. Consequently it is also valid that a propitiatory offering be made a recurring one or for a certain time. Propitiatory offerings of a thing which lasts for a long time shall also be valid and also of that thing which shall not last for a long time; it might be so used that it gets completely spent or exhausted or so used or spent that it lasts for sometime. But the case of "propitiatory offerings" called *Waqf* is a bit different from this. It is because of its particular attributes, that it differs from the other propitiatory offerings. Because of this the Law-giver, (Sallallahu alayhi wa sallam) in order to distinguish it from other propitiatory offerings and to hold it to be of particular species, guided 'Umar in his statement towards this method. If "*Waqf*" like general properties of "Propitiatory offerings" had not been the bearer of any peculiar trait, the Prophet would not have in his statement addressed 'Umar in this particular way, "If you wish, confine the real land and make propitiatory offering of its income."

Bukhari has recorded the tradition reported of 'Umar in several Chapters of his *Ṣaḥīḥ*. Thus, it is narrated through Ibn 'Awn, Nafi' Ibn 'Umar in the chapter, "Conditions in *Waqf*" that 'Umar came in the presence of the Prophet for taking his advice about the land that he ('Umar) had obtained in Khaybar. He said, O' Prophet! the land that I obtained in Khaybar is the best of the properties I ever got. What are your instructions about putting the same into use in the name of Allah "The Prophet said, "If you wish, confine the real and make propitiatory offering of its usufructs" 'Umar, accordingly, made the propitiatory offering of the same with conditions that the land must not be sold away or given away in gift nor it be open to inheritance. Its income (alone) should be spent on

the poor and the relatives and on freeing the slaves and on the services rendered to travellers and on hospitality. The person who shall manage the land shall with propriety take some of its income for self and the rest of it he shall spend on feeding others. He shall not amass its income for self and thus try to become wealthy.⁴⁰ The words of this narrative as recorded in the chapter "How the Waqf is to be written down" are the same.⁴¹

In other narrative through *Ṣaḥr* b. Juwairiyah, Nāfi', Ibn 'Umar under the Chapter "What are the powers of the executor in the orphan's property" it is reported that 'Umar made a propitiatory offering of his property in Prophet's period. The property was a fruit bearing date garden. He said, O' Prophet! I have obtained a property of the finest quality. I intend to make a propitiatory offering of the real property in such a manner that the same may not be sold or may not be given away in gift or may not be divided as inheritance, rather (the income from) its fruits be kept expended." 'Umar, therefore, made the propitiatory offering (in that manner). Hence the income from it continued to be spent in the name of Allāh, on the down-trodden and the poor and on freeing the slaves and on entertaining the guests and on travellers and relatives. There could be no harm in the *Mutawalli* taking for himself or giving away to friends from its income according to their actual needs, provided he tries not to amass its income with a view to get wealthy.⁴²

Again in the third narrative, through Ibn 'Awn, Nāfi', 'Umar, has been stated in Chapter on "Waqf for poor & wealthy" thus, "He consulted the Prophet about the land which Umar had obtained in Khaybar. The Prophet told him, "If you like, make a propitiatory offering of the same." Accordingly, 'Umar made a dedication of the same to be spent on the poor and needy and the relatives and on the entertainment of guests. The same tradition has again been related through Ayūb, Nāfi', Ibn 'Umar in the Chapter on "Maintenance of Mutawalli from the Waqf" that 'Umar had set a condition in the Waqf that whoever becomes its *Mutawalli* he could with propriety make (from the Waqf) provisions for his own maintenance and for his friends in an approved manner, but he shall not try to get wealthy.⁴³

Abu Da'ud has narrated this tradition on three authorities and the last narrator of each of them is 'Abdullah b. 'Awn who has narrated from Nāfi'.

⁴⁰Al-Bukhari: *Al-Ṣaḥīḥ*, Karachi, p. 282.

⁴¹Ibid, p. 387.

⁴²Ibid, p. 389.

⁴³Ibid, p. 389.

Imam Ahmad and Dār Qutani have narrated the same from Ayub, Nāfi', and Tahawi too has narrated it from Yahya b. Sa'id Ansari, while Naṣā'ī has done so from Abdullah b. 'Umar.

Keeping in view the above narratives, the question arises whether 'Umar was ignorant of the method of making a *propitiatory offering* and came to the Prophet for his advice? Clearly the answer to it would be that he, of certain, was aware of all the current methods of making propitiatory offerings. This should be so because the Prophet, previous to this incident, continuously kept on urging his Companions to *sadaqāt*, propitiatory offerings and the Companions, including 'Umar himself, continued making them. This was no secret at the time this particular event did occur after the conquest of Khayber. The practice of making propitiatory offering in general was greatly in vogue. In spite of all these, Umar's making reference to the Prophet and seeking his advice on his making propitiatory offering of his property in the name of Allah must be with certain set intention and purpose which could not be other than this, that out of the various types of offerings this special type of offering must be authorised so that its maker may obtain a permanent and ever lasting compensation and reward of virtue, and the poor and needy may enjoy a continued benefit of the same and the family of the maker of the propitiatory offering as well may profit from it. At the same time the property itself may remain safe from being plundered so that by its existence a permanent gain may continue to accrue to the community. Consequently the argument of those who hold Waqf for a period lawful on the grounds that Waqf is a kind of propitiatory offering and the propitiatory offering whether permanent or for a period is valid so shall Waqf too of both types be valid, is not correct. The entire incident involving 'Umar refutes it. Haḍrat 'Umar having continuously seen and made such propitiatory offerings earlier his putting such a suggestion to the Prophet becomes meaningless, unless he wished that such a dispensation be duly authorised by the Law-giver (Sallallahu 'alayhi wa sallam). He, on the occurrence of the very idea of expending in the name of Allah, could have divided the garden among the beggars, needy and other deserving persons. It was not difficult to do so. The Prophet too had at once understood the purpose of 'Umar. Had it not been so the Prophet would have given a clear and short answer: O 'Umar! Don't you know the method of making "propitiatory offering". As other Muslims or you have been making it, make it in the same manner. What do you mean by consulting me?" But the Prophet advised (and sanctioned) a new method which was termed as "Waqf".

Shaykh Abū Zuhra holding "Waqf" to be one of the kinds of propitiatory offerings has also argued, "Creating an explicit difference between the general *Sadqah* (general propitiatory offerings) and "*Sadqa Waqf*" is unjust. It is not commended by a *nass* (textual manifestation by the Book or the Prophetic Sunnah).⁴⁴ To this writer this remark seems strange, because if by manifestation (*rass*) Abū Zuhra means the authority of the Tradition, the incident of 'Umar which Abū Zuhra himself has stated in support of his own argument and of those who are convinced of the permanency of Waqf, is a proof of the permanency of Waqf. 'Umar, in search of an excellent method of making propitiatory offering went to the Prophet and the Prophet had told him of the method which was the best of its kind for the persons intending to make such propitiatory offerings. And if by 'manifestation' Abū Zuhra means an authority from the Book of Allah there are a large number of verses from the Qur'an which hold the propitiatory offerings made permanently and for obtaining the favour of God to be the best.

There are two methods of spending one's wealth to seek the pleasure of Allah. One method is that at one time wealth be spent in the name of Allah and at another time it be not spent in that manner. Rather the same be spent upon the necessities of one's self and on one's family members distinguishing, its spending on others. The other method is that excluding one self and one's relatives permanently from the proprietary rights of the property it be continued permanently to get spent in the name of Allah. It is apparent that the love of property shall oblige him to adopt the first method and he would prefer that his property be sometimes utilised for his own requirements and necessities. He would not like at all that his property be permanently alienated. Out of these two methods of spending in the name of God, the best one would of course be that he must exclude it from his ownership permanently. This demands that propitiatory offering in the form of a Waqf be in its effect different from other various propitiatory offerings. Such precedents and proofs are available in the Shari'ah. To observe difference between the two is not merely correct but is essential. If this be not so, Waqf's specific quality established from the Prophet's tradition regarding 'Umar, would turn out to be meaningless.

The arguments that have been made in connection with the said tradition on behalf of those who believe in the validity of

⁴⁴Shaykh Abu Zuhra: *Al-Waqf*, Cairo, 1959.

⁴⁵Al-Shafi'i, Muhammad Idris (d. 204 A.H.): *Kitāb al-Risalah*, Cairo, 1358 A.H., p. 213.

Waqf made for a period, according to the present writer, are weak and not weighty enough as compared of those who are convinced of the condition of permanency in Waqf. The condition of permanency in Waqf requires that Waqf which is not created with that condition shall not be called a "Waqf," rather it shall be, like other kinds of propitiatory offerings, one which shall not in respect to reward and virtue attain the degree of propitiatory offering by way of Waqf. It shall only amount to a general propitiatory offering entitling its maker to its general reward and virtue.

Shaykh Abū Zuhra in this connection refers to "*Fath al-Qadīr*" of Kamal Uddin Ibn Humam and quotes an assertion of Abu Yusuf that if the line of the beneficiaries in whose favour the waqf is created extinguishes the Waqf property reverts back to the heirs of the Waqif (creator of Waqf). This assertion is supported by "*Fatwa*". Abū Zuhra tries to show from this that, besides some of the Shi'ah Imamiyya, some of the Hanafi Imams as well agree in this with Malik, and Malik is not alone in this assertion. After quoting the assertion, Abū Zuhra argues that as Abū Yusuf is properly convinced that the Waqf property reverts back to the heirs of the creator of Waqf, he must be considered to be convinced of correctness of Waqf for a fixed period, say of ten years. To meet it, we may refer to another narrative of Abū Yusuf which has been quoted in "*Fath al-Bari*" by Ibn Hajr.⁴⁶ Imam Tahawi has reported from 'Isa Ibn Abān that Abū Yusuf was convinced of this validity of the sale of Waqf property. But when he learnt of this tradition concerning 'Umar he asked as to who had heard of the tradition from Ibn 'Awn. Ibn 'Ulayyah accordingly repeated tradition to him on his own authority. Thereupon he (Abū Yusuf) said: then, it is not valid for any one to speak against it, and added that if the tradition had reached Abū Hanifah, he too would have been convinced of it; he, therefore, reversed his view of the validity of sale of the Waqf property.

In my view, too, Abū Yusuf had then become convinced of a Waqf's permanency. Had it not been so, he must have continued to believe in the validity of Waqf property being sold under necessity; as he was convinced, at one time, of reversion of the Waqf property to the heirs of the *Wāqif* (creator of Waqf). That is why, the latter Hanafi jurists have quoted Abū Yusuf's last authoritative ruling to the effect that permanency is a condition for Waqf. According to him the very word, "Waqf", alone is sufficient to indicate the permanency of Waqf. It requires no exposition. Whatever has been quoted from Imam Abū Yusuf in "*Al-Mabsut*" also carries the

⁴⁶Ibn Hajr: *Fath al-Bārī*, Cairo, vol. vi, p. 331.

same sense that he does not consider it necessary that the condition of permanency be mentioned in the Waqf-deed. The Waqf shall rather become permanent without specifically mentioning it.

Conclusion :

From the aforementioned discussion, it may be concluded that permanency is the basic condition of Waqf although, because of other occurrences thereafter, alternations and changes may be effected therein, without affecting its permanent character. These would rather be called "exceptions." All the minor questions of alternation in Waqf etc. are, in fact, based on this rule. The classical 'Aimmah are all agreed on this point. Thus the land and other immovable property in Waqf, if at any time, reaches a condition that its utilisation in the way of Allah or for the benefit of those in whose favour the Waqf was created, becomes impossible, the exchange of that Waqf property into another land or immovable property has been held to be valid by those jurists as well, who hold the permanency of Waqf to be its essential ingredients.

In my view, therefore, the very word "Waqf" in its special meaning and sense proves its permanency and because of this attribute it is distinguished and differentiated from other propitiatory offerings.

Nature of Waqf under Egyptian Law :

The Egyptian Government in conformity to Imam Malik's view has through Act No. 48 of 1946 held that if a Waqf is charitable, it is valid in both the temporary and the permanent forms. In case the Waqf is not charitable its dedication cannot be permanent legally. Accordingly, *Waqf 'alal-Awlad* has been restricted to two generations. Similarly *Waqf 'alal-Awlad* which, as regards period, is not for more than sixty years has been held to be valid. On the contrary, the *Waqf* of a mosque, for a limited period, has been held to be invalid. It is essential that it be dedicated permanently.

Nature of Waqf under Lebanese Law :

The law of Waqf that has been promulgated in Lebanon is to a great extent derived from Egyptian Law. Specially on the question of *Waqf 'Alal-Awlad* the Egyptian Law has been followed. Hence, *Waqf 'Alal-Awlad* which is permanent has been held to be invalid. *Waqf 'Alal-Awlad* has been held to be valid for the two generations excluding the *Waqif* or sixty years. Thereafter, the Waqf property shall revert to him or to the heirs of his first

generation. In their absence it shall revert to his heirs of the second generation. If there be no heir of the *Waqf* existing, it shall pass to the Waqf Department.

Conditions not negating Waqf:

There are some kinds of conditions which do not negate the lawfulness of Waqf:—

- (a) The conditions which do not intrude into Waqf itself or into the Waqf's mandate.
- (b) The conditions which do not initiate against the Waqf for its mandate and though they may adversely affect the interest of the beneficiary but may not themselves be against the *Sharī'at*.

The following propositions are based on the kinds of conditions stated above:—

- (1) The creator of Waqf says, "I give in Waqf my land or the house on condition that whenever I like I may take back the same out of the Waqf or may give the same away in gift or may give away the price of the same in gift or may whenever I like mortgage the same and exclude the same from the Waqf." The Waqf with such conditions shall be void except when such Waqf has been made for a Mosque. In that case the Waqf shall be valid and the said conditions shall be void.⁴⁷

In the following propositions the Waqf shall be valid and the condition shall be void and inoperative:—

- (2) A Waqf is made for a person on condition that he shall give a certain amount of loan to the Waqf. The Waqf made shall be valid and the condition shall be void.⁴⁸

⁴⁷Ibn 'Ābidīn: op. cit., vol. iii, p. 371; Ibn Nujaym: op. cit., vol. v, p. 203; Shykh Nizam al-Din: op. cit., vol. ii, pp. 316-30; Al-Khassaf: op. cit., p. 129.

⁴⁸Shykh Nizam al-Din: op. cit., vol. ii, p. 329; Ibn Humam: op. cit., vol. v, p. 60.

- (3) A person makes a Waqf for his progeny with permission that when they become incapable of preserving the Waqf property they may sell it. According to a preferred authoritative verdict of Abū Yūsuf the Waqf shall be valid and the said permission shall be void.⁴⁹
- (4) A Waqif makes the condition of his being appointed as the trustee of the Waqf and stipulates that the Ruler or the Qāḍī shall have no authority of discharging him. If the Waqif did not prove himself to be trustworthy the Qadi shall have the authority to dismiss him and the stipulation shall be ineffective. The Qāḍī shall also have the authority of discharging the Mutawalli appointed by the Waqif if there be another person better suited to the office of Mutawalli. Further, if the Waqif stipulates that a certain person shall be the Mutawalli of the Waqf and it shall not be valid even for the Waqif himself to discharge him from the office of Mutawalli, such stipulation shall be void.⁵⁰
- (5) The Waqif stipulates that the Waqf property be not let out on rent or leased out for more than a year. But it is later found that the people are not prepared (to take on rent or lease) for one year's period but are agreeable to do so for a period of more than one year, the stipulation of the Waqif shall be disregarded only if it be profitable and in the interest of the Waqf property. The Mutawalli of the Waqf may with the permission of the Qāḍī, lease out the property for a longer period. If the Waqif has said in the "Waqf Deed" that if leasing out for more than a year be profitable it may be leased out, then, the Mutawalli, even without the permission of the Qāḍī, may lease out for a longer period.⁵¹
- (6) A person makes a Waqf on condition that his income of the Waqf property shall be spent till his lifetime on the own person and on his family, and after his death if there be debt due against

⁴⁹Shykh Nizam al-Din: op. cit., vol. v, p. 330.

⁵⁰Ibid, p. 332; Ibn 'Ābidīn: op. cit., vol. iii, pp. 367-69; Ibn Nujaym: op. cit., vol. v, pp. 241-65.

⁵¹Shykh Nizam al-Din: op. cit., vol. ii, p. 336; Ibn 'Ābidīn: op. cit., vol. iii, p. 401.

him the same shall first be paid up from its income, thereafter its income be spent in the name of God on the destitutes and the needy persons or that after his death a fixed part of the income of the Waqf property be separated and be spent on his behalf on Haj pilgrims or be spent on expiation of the breach of his oath or be spent on such and such occasion, and the remaining part thereof be spent on Waqf purposes. Acting thus shall be valid.⁵²

- (7) The Waqif stipulates that so long as he is alive its income shall be spent by him and after his death it shall be spent by his issues and thereafter it shall be spent by their progeny till his lineage survives. When the lineage comes to an end, the needy shall be entitled to it. Such a Waqf shall be valid. Similarly if the Waqif makes the stipulation for issues and the progeny of others too the same rule as above shall apply.⁵³
- (8) The creator of Waqf stipulates that he shall utilise the produce of the Waqf property for himself and for his family and whatever remains of it shall belong to (the rest of) the other persons in whose favour the Waqf has been created. The produce of the property then received by the *Waqif* is sold and its value is realised by him but before he utilises the same he dies. In that case the value of the produce so realised by the *Waqif* shall belong to the heirs of the *Waqif*.⁵⁴
- (9) A person creates Waqf of his land in favour of his wife and children. The wife dies. If the *Waqif* has stipulated that in case any of the beneficiary dies his share would go to the children of that beneficiary, then on the wife's death her

⁵²Shykh Nizam al-Din: op. cit., vol. ii, p. 329; Ibn Nujaym. op. cit., vol. v, p. 238; Al-Khassāf: op. cit., p. 26; Ibn Humam: op. cit., vol. v, p. 58.

⁵³Shykh Nizam al-Din: op. cit., vol. ii, p. 329; Ibn Nujaym: op. cit., vol. v, p. 238; Al-Khassaf: op. cit., p. 149; Ibn Humām: op. cit. vol. v, p. 58.

⁵⁴Shykh Nizam al-Din: op. cit., vol. ii, p. 329; Ibn Nujaym: op. cit., vol. v. p. 236.

share would go as Waqf to her children only. If no such stipulation had been made the share of the wife shall be divided between all those in whose favour the Waqf was created.⁵⁵

- (10) A Waqif stipulates in his Waqf that a certain person be regularly paid from the income of the Waqf property in accordance with his needs. That person, at the time of the creation of Waqf, was alone. He had no family. Subsequently he raised a family. He shall, according to the said stipulation, be entitled to receive so much share from the Waqf property income that may be sufficient for all of them.⁵⁶

Shi'ah point of view :

Najm al-Din Al-Hilli has written in his noted book on Shi'ah *fiqh* "*Sharai' al-Islam*" that the conditions applicable to are of four kinds :—

1. Conditions applicable to property that may be dedicated in Waqf.
2. Conditions applicable to the Waqif.
3. Conditions applicable to the beneficiary.
4. Conditions applicable to the declaration of Waqf.

Conditions for Waqf property :

There are four kinds of properties that may be dedicated in Waqf :—

1. The property dedicated must be actually in hand. Merely the dedication of loan or profit receivable shall not be valid.
2. The property dedicated must be owned by the dedicator and must not be unlawful property.
3. The real property remaining intact, the realisation of benefit from it be possible and permissible (mubāḥ) in Shari'ah.
4. The delivery of possession of the property and its utilization be possible. (The giving away of a runaway slave in Waqf is, therefore, not valid).

⁵⁵Shykh Nizam al-Din: op. cit., vol. ii, p. 329,

⁵⁶Ibid.

Conditions for Waqif (Creator of Waqf) :

The creator of Waqf must be major, of sound mind and competent to deal with his property.

Conditions for Beneficiary :

Three conditions are essentially applicable to the beneficiaries of a Waqf :—

- (i) He must be in existence at the time of the creation of Waqf so that he may be able to exercise ownership.
- (ii) He must be of known identity.
- (iii) Creation of Waqf in his favour must not be unlawful.

Conditions for Waqf :

There are four conditions for Waqf :-

1. The Waqf must be perpetual.
2. The Waqf must not be made to depend on such an eventuality whose occurrence or otherwise be evenly possible.
3. The possession of the Waqf property must be handed over. (According to Shi'ah jurists if the creator of Waqf dies before handing over its possession the Waqf shall not be valid and it shall revert to the heirs, whereas according to Sunnis mere declaration would be sufficient to constitute a valid Waqf).
4. The Waqif should have relinquished the property completely.

Lawfulness of Waqf under Egyptian Law :

The provisions relating to the validity of Waqfs have been made in Section 6, 9, 17, 19, 20 to 25 and 27 of the Egyptian law of Waqf, 1946, which, *inter alia*, provide that a Waqf created with a condition which is void shall be valid and the condition would be void.

Section 206. (1) If a Muslim in sound health, full senses and understanding acknowledges a property which is in his possession and under his proprietorship, to be Waqf, his acknowledgement shall be valid and shall be deemed to be "Waqf Property".

Acknowledgement
of Waqf in sound
health and in
death-illness

(2) Acknowledgement of Waqf by a person in his death-illness shall be valid to the extent of that property or of one-third of his property left at the time of his death, whichever is less ; and such property shall be deemed to be Waqf property.

COMMENTARY

When a person in state of his health with prudence and full understanding acknowledges a land or a building which is in his ownership and possession to be Waqf but does not name its Mutawalli nor its beneficiaries, the acknowledgement of that person in respect of the said land or building shall be valid and the land or the building shall be "Waqf" for the poor. However that person shall not be considered to be the creator of that Waqf when it is established by evidence that the Waqf property was not owned by him at the time of possession. Otherwise he shall be its Mutawalli; except when Mutawalliship of another person is established by evidence. In case of an ambiguity the official of the State shall intervene. If a person admits about the land or building in his possession that his deceased father had created Waqf of it but speaks nothing of those in whose favour the Waqf was created, his admission so far as his person is concerned shall be valid. If his deceased father owed some debts or had made a will and except that Waqf property there existed no property of the deceased father, such portion of that land or building shall be sold that might cover the deceased's debt or satisfy the will (to the extent of one-third of his total property) and the remaining portion of it shall be Waqf. If the debt of the deceased covers the entire property, the whole of it shall, then, be sold except when the one who acknowledged the Waqf clears his father's debt out of his own fund. When there would be no debt due on the deceased father, the entire property, according to the admission of the acknowledger, shall be Waqf. If alongwith the acknowledger there be another such heir who denies that the property is Waqf, the share that belongs to the acknowledger only shall then be Waqf and the share belonging to the denier shall belong to him as his property.^{56-a}

The denial by a person in whose favour acknowledgement has been made does not make the acknowledgement of the acknowledger as void. For instance

^{56a} *Al-As'ūf*, Cairo, pp. 37-38; *Fatawa Khaniyah*, Cairo, 1282 A.H., p. 313.

a person makes an acknowledgement of Waqf in respect of property in favour of two persons, who are not heirs, that the land or the building in his possession has been so declared in their favour. One of the beneficiaries confirms it and the other does not. Waqf of the land or the building then shall be Waqf in favour of the one confirming it and the other half of it shall be considered to be Waqf but only for the poor and destitute. If the one denying however confirms it at a future date, he shall then be held to be entitled to that Waqf.^{56b}

If a person claims a Waqf property to be his property and the heirs of the creator of Waqf as well acknowledge the property to be his, the Waqf, because of their acknowledgement, shall not be void; on the contrary the heirs shall have to compensate him from their inheritance equal to the value of that property. If the heirs deny the claim of the plaintiff and the plaintiff leads no evidence, rather he expresses the intention of putting the heirs on oath, the heirs shall not be liable to be put on oath.^{56c}

If a property is claimed (by one to be his) before its being acknowledged as Waqf but thereafter the Waqf is acknowledged, the same shall be acceptable. Hence, if a person claims at first that the building standing on the land in his possession is his property but the land itself is Waqf, the land and the building both shall be considered as Waqf, by virtue of this acknowledgement. The acknowledgement of the Mutawalli of a Waqf against the Waqf shall not be valid, but his acknowledgement of Waqf about some property out of the properties in his possession shall be valid.^{56d}

Acknowledgement in death-illness :

When a person suffering from death-illness acknowledges that the land or the building in his possession is Waqf property, that he had made it a Waqf or that someone else had made it a Waqf, but does not disclose the identity of the person who has created the Waqf or leaves the names of the persons ambiguous in whose favour the Waqf has been created, the acknowledgement shall, then, only be valid to the extent of one-third of his possessions. If this land or the building is held to be one-third

^{56b}*Al-As-ūf*, Cairo, p. 40.

^{56c}Shykh Nizam al-Din: op. cit., p. 350.

^{56d}*Ibid*, p. 438; *Tanqih al-Hamidiyyah*, Cairo, p. 74 (*Kitāb al-Iqrār*).

of his entire possession, the entire shall be Waqf, otherwise it shall be Waqf to the extent of his one-third legacy when the heirs do not agree to more than one-third of the Waqf or the heirs be not present there. But if the sick person acknowledges that a certain person on certain grounds had created Waqf of the land or building in his (the acknowledged's) possession then the entire property shall be taken to be Waqf. However, if he does not declare it so, it shall be Waqf to the extent of one-third of his legacy only. On the contrary when a sick person in his death-illness acknowledges with respect to the property in his possession that a certain person had permanently dedicated the same in Waqf to him (acknowledger), and his children and to his progeny and thereafter to the poor and then had handed over its possession to him, this property, then, shall not be considered to be Waqf made for the acknowledged or for his children and progeny. An assertion made for himself and for his children and progeny shall not be acceptable, though there may not be in existence any person challenging his assertion.^{56e}

Section 207. The purpose for which a Waqf is created must be religious, charitable or pious as recognized under the Shari'ah.

Purposes of
Waqf

COMMENTARY

The basic principle of the purpose of Waqf is that it be religious, charitable or be for such purposes that are under Islamic law considered to be religious, pious or charitable.

Purpose of Waqf :

It is essential that the purpose of Waqf be clearly specified. If it is not, the Waqf, because of non-specification of its purpose, may be held to be null and void. Still it is not necessary that all the details and purposes be mentioned individually by name, nor is it necessary that it be mentioned in the Waqf deed as to what amount should be spent on each of the purposes (when the purposes of Waqf be more than one).

Partly valid and partly invalid purposes :

If a Waqf is created for more than one purposes, out of which some are valid and others are not, the Waqf to the extent of valid purposes shall be upheld and the purposes that are invalid shall be considered to

^{56e} *Al-As'āf*, Cairo, p. 35-36; Ibn 'Ābidīn: op. cit., p. 559.

be excluded from the ambit of Waqf. If the creator of Waqf, with both valid and invalid purposes, specified the expendable amount or the share of property for each item in such cases the Waqf of the property relating to invalid purposes shall be held to be null and void and the proprietary right of the said property shall continue to vest in the creator of Waqf. If all the purposes be found to be invalid, in such a case, the Waqf shall be held to be totally null and void.

Purpose Failing :

If any one of the purposes as mentioned in the Waqf Deed fails or becomes unrealisable, the Waqf shall not become void merely on that ground. If the intention of the creator of Waqf, with reference to the purposes mentioned in the Waqf Deed, be clearly found to be of religious, charitable, or pious nature, the Waqf shall be valid, and the income thereof shall be spent on such purposes that are akin and similar to the purpose that has failed or has become unrealisable. In English legal phraseology it is called the "Doctrine of Cypres".

A Waqf shall not be considered to be invalid merely on the ground that its use for the poor and the destitute or for other permanent religious, pious or charitable purposes has been kept in abeyance till the interests of the family, issues or of the progeny of the creator of Waqf come to an end.^{56f}

Pakistan Rulings :

Waqf for shrines : Creating Waqf of a property for the care, protection and upkeep of the shrine of a saint is valid. Creating a Waqf for the tomb of the father of the creator of Waqf shall be called a personal Waqf. Waqf Alal-Awlad too is a personal Waqf.^{56g}

Graveyard—public waqf, no exclusive right to use of graveyard can be claimed : Waqf may be created for graveyard (PLD 1967 Lah. 915; Law Notes 1967 Lah. 90) In a graveyard, which is a public waqf, no exclusive or preferential right can be claimed. The right must, of necessity, be a common right subject to availability of space. (PLD 1971 S. C. 376; Law Notes 1971 S. C. 478).

^{56f}Musalmans Waqf Validating Act, 1913.

^{56g}PLD 1964, Dacca, 575.

Long user as graveyard, waqf may be presumed : The Peshawar High Court in a case held : "Although there is no direct evidence on the record that the land was dedicated as a Waqf for the purpose of a graveyard, yet the creation of Waqf and dedication of land can be assumed from the user of land as a graveyard since a very long time." [PLD 1968 Pesh, 181 (DB)].

Khahanqah' and 'dargah'—difference between stated, takia, astana, khanqah, dargah, rouza, defined : "Where a *darwesh* or a person who, by leading a pious life, has won the esteem and veneration of the neighbourhood, or a *Sufi* of a particular sanctity has settled down in some locality, so long as he has not attained sufficient importance, his place of abode is called a *takia*. But when he is a man of importance or has attained sufficient eminence, it is designated as *astana*. His pious life and religious ministrations attract public notice, disciples gather around him, and a place is constructed for their lodgement, then the humble *takia* grows into a *khanqah*. After the death of the holy personage the spot where he is buried becomes a shrine and an object of pilgrimage not only for his disciples but for people of distant parts, both Muslims and Hindus, and is designated either as a *Dargah* or *Astana* or *Rouza*." (PLD 1971 S. C. 401.)

Dispute as to possession of mosque not possible, mosque cannot be locked and sealed to meet dispute as to its management : "There can be no dispute about the possession of the house of God. There can, however, be a dispute about its management and control. Such a dispute is not covered by section 145, Cr. P. C. and a Magistrate has no jurisdiction to proceed in the matter in such circumstances. A mosque cannot be sealed. It is criminal to seal the mosque. It is not only illegal, unjustified and without jurisdiction; it also attracts the wrath of Almighty on the person who is responsible in passing the order and those who sponsored and contributed to such an act. [1968 PCR LJ 659 (Lah.)]

Mosque-No restriction on entry of Muslims can be placed, all muslims have equal right to enter and pray in Mosque, dispute as to management of Mosque, prohibitory order may be passed against party interfering with management of Mosque : "Any Muslim can go and say his prayers in a mosque, of course without disturbing the congregation, even if the congregation is led by another sect. Surely, two congregations cannot be held in a mosque and no body can claim to introduce a congregation of his own choice in the mosque. It is the right of the *Mutwalli* to make arrangements for the congregation and control of the mosque. However, if there is any dispute

regarding the user of the mosque and there exists an apprehension of breach of peace, in such a case the Magistrate under section 147, Cr. P. C. can only prohibit interference with such a user. On the other hand, if the dispute is regarding the control and management of a mosque, in case of any apprehension of breach of peace regarding its user alone, prohibitory order can be passed by a Magistrate against one party in order to restrain him from interfering with the exercise of such a right by the other party." (1968 P. Cr. L J 659, Lah.)

Purpose of 'waqf'—upkeep and maintainance of 'khanqah' is proper purpose of 'waqf' : There cannot be any doubt that the purpose for which a Waqf is created must be one recognised by the Muslim Law as religious, pious or charitable. The upkeep and maintenance of a *khanqah* and its allied institutions for charity and religious instructions is one of those purposes. (PLD 1966 Lah. 978, DB).

Shrine of saint—Valid object of 'Waqf' : A shrine may be a valid object of Waqf, for, the offering of *fateha* at the tomb of one's ancestor or a saint is permissible, (PLD 1971 S. C. 401.)

Mosque property in India : In the instant case since the property in the revenue records received from India is shown to belong to mosque (which is a well known form of Waqfs under Muhammadan Law and evidently the underlying idea to attach land to a mosque was to achieve an object recognised by Islam as religious, pious or charitable and no benefit is shown to be reserved by any founder for himself, and ultimate object is to benefit the mankind and also because the property did not vest in any trustee but *Nikka* was simply shown as its manager, therefore, it satisfied all the ingredients of a Muhammadan Waqf rather than a Trust in the light of the points of distinction between these two concepts noted above. Again the area in dispute not being much, therefore, the Waqf here was a minor religious institution and allotment in its name in Montgomery (Sahiwal) District would be well 'within the four-corners of sub-para. (3) of paragraph 56, of West Pakistan Rehabilitation Settlement Scheme, reproduced above and no exception could have been taken to it by the delegatee Chief Settlement Commissioner in the exercise of jurisdiction under section 11 of the Act. It appears from *Fard-i-Haqqiyat* issued by the Central Record Office that the claim for the particular area in dispute was filed by *Nikka* in his capacity as manager of Waqf and it was verified in the name of Waqf, namely, Mosque. The proposal also was subsequently made in the name of the Mosque, and

was confirmed accordingly. In these circumstances, there was nothing wrong with the allotment made in the name of the Mosque, which was fully protected by sub-para. (3) of paragraph 56 of the Scheme. (PLD 1973 Lah. 327, DB).

Section 208. Waqf of an undivided share in the property which is indivisible or in the division of which there is the risk of its utility being adversely affected, is valid. But creation of Waqf of an undivided share of a divisible property is not valid.

Exception : Waqf of “*Mushā*” for a mosque or a tomb is in all cases invalid.

COMMENTARY

According to Abū Yusuf, Waqf may be created of the share in *Mushā* (undivided property) whether the property be capable or incapable of division. According to Muhammad al-Shaybani, however, creating Waqf of *Mushā* which is capable of division is not valid. But there is no difference among the Sahibayn on the point that Waqf of *Mushā* for a mosque or a graveyard is not valid because the partnership of another person in the ownership of a thing is the denial of God's sole proprietorship of that thing. Creating Waqf of a “*Mushā*” for the maintenance of an existing mosque is also not valid.⁵⁷

The basis of not creating Waqf of Mushā :

The question of Waqf of *Mushā* becomes involved with transfer of the property given in Waqf. Hence, the jurists who consider the transfer of possession of the Property in Waqf as an essential condition, hold the Waqf of *Mushā* (undivided share in the property) without division to be invalid. As against this, the jurists who do not hold the transfer of possession of Waqf property to be a condition for the validity and completion of Waqf, according to them, creating Waqf of *Mushā* is valid. The principle of the rule is that the property which is indivisible or the utility of which may be affected by division, its Waqf shall be valid without division; but the property which is divisible or the utility of which is not affected by its division, the Waqf of its undivided share without actual division is not valid. This is the Hanafi rule in practice.

⁵⁷PLD 1952, Dacca, p. 206.

Egyptian and Lebanese Laws :

With respect to the question of Waqf of *Mushā'* the practice of Abu Yusuf was followed in Egypt till 1946, but under Act No. 48 of 1946 it was laid down that Waqf of indivisible *Mushā'* is valid but Waqf of a divisible *Mushā'*, with the exception in certain cases, is forbidden. In Lebanon as well the law has been framed on the same pattern.

Waqf of Musha' for Mosque :

If the Waqf land has not been separated from the non-Waqf land, that is to say, if it be *Musha'* creating Waqf of it for a mosque or a tomb shall not be valid. But excepting this particular purpose, as there is a possibility of its division, its Waqf shall according to Abu Yusuf be valid; whereas according to Muhammad al-Shaybani it shall not be valid. Indeed, the Waqf of the property which is indivisible and is not amenable to division shall unanimously be valid. There is a consensual verdict on the assertion of Imam Muhammad with respect to the Waqf of *Mushā'*.⁵⁸

Imam Muhammad holds that the indivisibility which exists at the time of creating the Waqf is an impediment to Waqf; if the impediment is created afterwards, the Waqf shall be partly valid. For instance, a person creates a Waqf during his illness and his heirs after his death do not agree to Waqf of more than one-third and repudiate it, the Waqf of one-third only shall remain valid because the rights of the heirs in the Waqf are subsequently created. Likewise, if in a Waqf of apparently undivided land it so happens that the Waqf part becomes definite, the Waqf, according to Imam Muhammad, shall yet be valid. For instance, a person creates a Waqf of his entire land. After the Waqf is created, another person establishes his right on a part of that Waqf land. The Waqf of the rest of the land shall remain valid. Or, an undivided land belongs to two persons jointly. Both dedicate their shares of land in Waqf and make over its possession to a Mutawalli. The Waqf shall be valid because, in this case, there is no question of one part of land being a Waqf and another part of it not being a Waqf. The entire land forms the subject matter of the Waqf created.⁵⁹

⁵⁸Ibn Nujaym: op. cit., vol. v, p. 213; Ibn Abidīn: op. cit., vol. iii, p. 376; *Fatḥ al-Mo'īn*, Cairo, vol. ii, p. 507; Shykh Nizam al-Din: op. cit., vol. ii, p. 389.

⁵⁹Ibn Nujaym: op. cit., vol. v, p. 213; Ibn 'Abidīn: op. cit., vol. iii, p. 376; *Fatḥ al-Mo'īn*, Cairo, vol. ii, p. 506; Shykh Nizam al-Din: op. cit., vol. ii, p. 319; Ibn al-Humam: op. cit., vol. v, p. 47.

Sarakhsi quotes Imam Abu Yusuf in his book, "*Al-Mabsur*" that if a person creates Waqf of half of his undivided land or building in favour of the poor, that Waqf shall be valid. This according to him is so because division is a requisite of possession and the need for division shall arise whenever its possession shall be made over. Imam Abu Yusuf holds that making over possession is not an essential condition in a charitable Waqf itself; it would not thus be so in any consequential disposition. Hence, in the event of an undivided share being declared so it shall constitute Waqf. According to Imam Muhammad, however, creating Waqf of a property, which is divisible but is not divided, shall not be valid; because, in his view transfer of possession is essential for the completion of Waqf. And taking possession of the property which is divisible shall be possible only when it is divided. According to him, Waqf is a form of disposal of property in which the corpus of property is immediately settled on the transferee; hence it shall not complete as long as its possession, after division of the divisible property, is not made over. Consequently the Waqf of part of an indivisible property without division shall be valid but the Waqf of any part of a divisible property, without its division, shall not be valid. That is to say, property which is divisible effecting Waqf thereof without its division shall not be valid. Hence, Waqf of property for a mosque or a tomb, when such property is not divided shall not be valid because it is impossible to consider its part dedication for Allah alongwith the existence therein of the share of others.⁶⁰

Section 209. (1) If the debt of the creator of Waqf covers Waqf by debtor his entire property the Waqf created by him shall not be valid.

(2) Creating Waqf by a person with the malafide intention of defeating his creditors shall not be valid. Such a Waqf may be got annulled through Court by the creditors within the period of three years from the date of their having knowledge of it. Provided, in any case, that this right shall be deemed to have lapsed after the expiry of a period of twelve years of the Waqf coming into existence.

⁶⁰Al-Sarakhsi: op. cit., vol. xii, p. 37.

COMMENTARY

The majority of jurists agree that if the debt of a person covers his entire property, he shall be barred from dealing with his property (i. e. making a gift or creating a Waqf.) In such circumstance, the court shall have power to order the annulment of such settlement of property by the debtor. When his debt does not cover his entire property, he shall not be stopped from dealing with his property, Imam Abu Hanifah holds a different view. According to him, in none of these cases that person shall be hold disqualified to deal with his property. According to the jurists who favour disqualifying a person from dealing with his property in the event of his debt covering his entire property such person shall have no right of effecting Waqf, except when his creditors permit him to do so. If there is an injunction against the debtor, the unanimous view is that he cannot mortgage his land or effect its gift or Waqf or otherwise transfer his property.

The question arises that if a debtor is not barred from the utilisation of his property and he is of sound health and his debt does not directly connect his property by way of mortgage etc., whether, in such circumstances, his creating Waqf of his property shall be valid or not? According to Hanafi *fiqh* his creating Waqf shall be valid. According to Maliki *fiqh*, however, if the creation of Waqf becomes the cause of harming the interest of the creditors, they shall have the right of getting that Waqf declared annulled because every creditor has the right of getting payment of his debt from the property of his debtor. Thus a debtor's creating Waqf with the purpose of harming the interest of the creditor shall be invalid.⁶¹ But according to Zahiriyyah's practice creating such a Waqf shall be valid.

Conclusion :

The conclusion arrived at after examining the question is that creating Waqf of a property by a person with the intention of depriving the creditor of his right of realising his debts may defeat the Waqf, specially when the debt covers the entire property of the Waqif. Similar is the case with gift.

Right of getting a Waqf declared void—Limitation :

A creator, under Egyptian Law, has the right of getting a Waqf declared void within three years of the date of creation of that Waqf. But this

⁶¹Sahnūn (d. 240 A.H.): *Al-Mudawwanah*, Cairo, 1323 A.H., vol. xiii, p. 78; Al-Khalaf, Abdul Wahāb: *Aḥkām al-Awqāf*, Cairo, 1367 A.H., p. 46; Mustafa Zarka: *Aḥkām al-Awqāf*, Cairo, 1366 A.H., p. 67, foot note 1.

right can in no way be exercised after the lapse of twelve years of such creation.

Section 210. (1) Waqf may be created by will to operate after Waqf by Will the death of the creator of Waqf; the law of wills shall apply to such a Waqf.

(2) Waqf by will may at all times be revoked before the death of the Waqif.

COMMENTARY

The Waqif is entitled to create Waqf of his entire property in his life-time, being the owner of the same. But he can create Waqf of his property through a will only to the extent of its one-third. If he creates Waqf through will of more than one-third of his property, such a Waqf, without the consent of the heirs, shall be ineffective with respect to the property which is more than one-third.⁶²

The specification of one-third of the property shall be made after meeting debts due from him and the funeral expenses, if any.⁶³

The reason for this is that under the principle of لا ضرر ولا ضرار فى الاسلام a Waqf by will for the property in excess of one-third deprives the heirs of their rights that have been bestowed upon them by God. Hence the Waqf cannot take effect contrary to the biddings of God. Waqf by will may, therefore, be held to be effective to the extent of one-third only.

As a person who makes a will can amend or revoke it whenever he likes, similarly the Waqf can be revoked or amended by the Waqif, whenever he likes in his lifetime.

Pakistan Rulings :

Testamentary Waqf—Essentials of Waqf must be complete at the time of death of testator, operation of Waqf cannot be suspended any further : The rigours of the essentials of a valid Waqf have been modified a little in their application to testamentary Waqf under Muslim Law, but it cannot be said that these principles have been altogether abrogated for all purposes in their application to testamentary dedication. Like all other Waqfs under Muslim

⁶²Al.Sarakhsi: op. cit., vol. xii, p. 26.

⁶³Ibid, p. 137.

Law, a testamentary disposition to Waqf must also fulfil the essential requirements of a valid Waqf. The Waqf under a will must be operative and the dedication complete, at least speaking from the time of the death of the testator, and it should not remain suspended any longer and must not be made to depend on future contingencies. [PLD 1969 Lah. 587—21 DLR (WP) 312, DB].

Testamentary 'Waqf', testator making bequest to his wife for life and leaving remainder to charity after her death, Waqf is not created: Where the testator made a will in favour of his wife who was to take for life and the remainder was to be waqf after her death, it was held that the will could be effective in favour of wife only with the consent of other heirs. As the consent was not forthcoming the will was void and therefore subsequent bequest to charity was also illegal. [PLD 1967 Lah. 672—Law Notes 1966 Lah. 44—PLD 1969 Lah. 587—21 DLR (W.P.) 312 DB].

Section 211. The Law relating to "*hiba by will*" shall also be applicable to the Waqf created during death-illness.

Waqf during death-illness

COMMENTARY

By "death-illness" that ailment is meant which is proximate to death, because of which, though death may not occur but, there be a strong presumption of the occurrence of death of the person suffering from it. (For detail see Vol. I pp. 372-73, discussion on *marq-al mawt*).

The restrictions that the jurists have placed upon one's power of the utilisation or appropriation of property during "death-illness" do establish that the law of "*Hiba bil-Wasiyyah*" shall apply to a Waqf created during "death-illness". In this the four Sunni (Hanafi, Maliki, Shafi'i and Hanbali) and the Shi'a sects are all unanimous. But the Zahiris hold a Waqf created during death-illness to be valid whether or not it is in respect of the entire property. According to them, there is no difference between the state of sound health and the state of *marq al-mawt*. Hence they hold that Waqf, which may have been created with a view to save the property either from the creditor's debts or from the inheritance by the heirs, shall take effect.

Tahawi has stated that Imam Abū Hanifah held that if a person, after creating a Waqf during death-illness, implements its conditions, (during that illness) it shall in that case too be considered as if he has made a will to take effect after his death. Hence the Waqf shall take effect only with respect to one-third of the property left by him.⁶⁴

⁶⁴Ibid, p. 27.

Imam Muhammad is of the view that when the Waqif in his life-time and in sound health, makes over the Waqf property to a Mutawalli, the Waqf shall take effect with respect to the entire property dedicated in Waqf. If however; he has done so in the state of his *marq al-mawt*, the Waqf shall take effect only with respect to one-third of the property, because at this time, he is extinguishing his title from his property merely out of charity.⁶⁵

Section 212. It is valid for every Muslim to create a Waqf
 Waqf 'alal which is in accordance with the conditions laid
 Awlad down under Islamic Shari'ah for, amongst others,
 the following purposes:—

- (a) Entirely or partly for the maintenance and support of his family, issues and the progeny.
- (b) For his own maintenance and support during his lifetime or for the payment of his debts out of the rents, income and profits of the Waqf property, provided that the ultimate benefits in such cases must, expressly or impliedly, be reserved for the poor or for other purposes recognised by the Islamic Shari'ah to be religious, pious and charitable of permanent character.

Explanation : A Waqf shall not be considered to be invalid merely because the benefit reserved therein for the poor or other religious, pious or charitable purpose of a permanent nature has been kept in abeyance till the extinction of the family, issues or progeny of the Waqif.

COMMENTARY

Waqf 'alal-Awlad concerns with Waqf of property created in favour of one's family members. Ordinarily creating Waqf of all kinds under the Shari'ah is an act of piety; but creating Waqf in favour of one's own issues, family members and relatives has preference over the creation of other Waqfs. It is an act of higher virtue, as it is the duty of every Muslim to secure maintenance first for those whose responsibility of maintenance rests upon him.

⁶⁵Ibid, p. 32.

A Unique Law :

There is no law in any other religion that may be compared to the Islamic Law of *Waqf 'alal-Awlād*. Waqf, in Hindu Law, may only be created in favour of a family deity, but not in favour of one's issues and other relatives. Indeed, in some respects, the Law of Joint Hindu Family and Joint Hindu property may resemble to a certain extent with Islamic Law of *Waqf 'alal-Awlād*. But Waqf 'alal-Awlād, in its fundamentals and constituents, possesses an individuality of its own.

In India and Pakistan :

In Indo-Pak sub-continent in the early days of British rule *Waqf 'alal-Awlād* was held to be invalid on the basis of Privy Council's judgement pronounced in the case of *Abdul Fath Muhammad Ishaque vs. Rasamaya* reported in I.L.R. Cal. Vol. XXII, (1894) at page 619. One reason, amongst others, of this decision as given was that it resulted in the family members drawing benefits whereas benefits to the poor accrued long afterwards and that too was uncertain. *Waqf 'alal-Awlād*, it was held, was therefore a Waqf in name only. Besides, creating Waqf for one's own issues is not under the Shari'ah included in benevolent acts.

This decision was opposed to Islamic Shari'ah. Hence, on the demand of Muslims in order to offset its effects, Musalman Waqf Validating Act VI of 1913 was enacted and enforced, and through this piece of legislation *Waqf 'alal-Awlād* was declared valid and operative in this Sub-continent during British regime too.

To make the said Act of 1913 retrospective, an amending Waqf Act was passed in 1930 by which all those Waqfs '*alal-awlad*' that were in accord with the conditions laid down by Islamic Shari'ah were validated though such Waqfs might have been created prior to 1913.

Ultimate Benefit :

In case of Waqf '*alal-awlad*' the ultimate benefit has necessarily to be reserved for permanent religious, pious or charitable purpose; for instance, for the maintenance and support of the poor, for the construction of mosques and their expenditure, for the performance of funeral rites getting the graves dug and the burial of the poor as well as for all kinds of charitable purposes that may benefit the human beings such as construction and maintenance of inns, bridges, roads, etc. It shall, however, be enough if the permanent charitable and pious purposes for which the Waqf is created and to which the income, rents and profits of the Waqf property shall be put, is specified, either expressly or impliedly, in the Waqf-deed.

The motive behind ultimate benefit being religious, pious or charitable is that Waqf, in essence, is a permanent endowment and the issues or relatives are, in fact, mortal and at one time or the other are liable to become extinct and the chain of progeny of the deceased creator of Waqf may end. Hence, to keep intact the permanent nature of Waqf it is necessary that its ultimate purpose be of such permanent religious, pious or charitable nature and character that may continue in perpetuity.

Awlad :

By the word "awlad" in a Waqf are meant all those relatives who are ascendants or descendants of the creator of Waqf (or of his forefathers). If a person creates a Waqf in favour of issues then both the male and the female issues who are in existence at that time or at the time of the death of the creator of the Waqf, shall be included therein. But after the death of the Waqif, the word "issues", shall mean only the male issues, one generation after another, except when it appears from the Waqf deed itself that both the male and female issues, one generation after another, are all included therein. In case of "Waqf 'alal-awlad", if the creator of Waqf creates it in favour of one or two generations its benefits shall remain limited to one or two generations only, as the case may be unless the intention of the Waqif (creator of Waqf) appears to be otherwise. But when he creates the Waqf for the benefit of three or more than three generations, the benefits of the Waqf shall accrue to generation after generation in perpetuity.

Distribution of Income :

If a Waqf is created in favour of several persons or for several purposes without specification, its income shall be divided equally at the same time among them all. If the Waqf is created in favour of the issues, one generation after another, and their respective shares are not specified, all those in whose favour the Waqf is created and their issues shall be entitled to equal shares of its income. The established principle of the law of inheritance on the basis of which the males get twice the share of the females shall not be applicable to the law of Waqf. For instance, Zayd creates a *Waqf 'alal-awlad*. He, at his death, has two sons Umar and Bakr and one daughter Jamila. The income from the Waqf shall be divided equally between the three of them, the sister alongwith the brothers. But let us suppose, Umar also dies and leaves behind two sons and two daughters. The income from the property shall then be divided equally between Bakr, Jamila and the issues of Umar. Each shall get one sixth ($1/6$) of the income. If, however, the intention of the creator of *Waqf 'alal-awlad* appears to be that the share of the deceased son or daughter, shall be divided among his or her issues branch-

wise and not per capita, his intention shall be enforced in case of both the male and female issues accordingly.

Egyptian Law :

Under Egyptian Law of Waqf enacted in 1946, Waqf has been divided into three kinds:—

- (1) Waqf that should be permanent and if created for a limited time shall be invalid. Waqf for mosques is included in this category. In other words, Waqf for mosque must be of necessity a permanent one.
- (2) Waqf which can be perpetual or temporary depends on the Waqif whether he creates a permanent Waqf or a Waqf for a particular period. Besides those for mosques, all other charitable Waqfs are included in this category.
- (3) Waqf that is valid only when it is temporary or limited to a period and not valid when it is perpetual. This applies to *Waqf 'alal-awlad*. Hence, under Egyptian Law the longest period for Waqf 'alal-awlad has been fixed as sixty years after the death of the creator of Waqf; or that it be limited to two generations only, following the creator of Waqf.

Pakistan Rulings :

Waqf 'alal-awlād—Kinds of : *Waqf alal-awlād* may have different peculiarities according to the nature and number of the beneficiaries and the manner of sharing of the profits *inter se* in each case. One kind of Waqf is that in which the *Wāqif* is the sole beneficiary during his lifetime. In such a Waqf, the income is appropriated by the *Wāqif* himself and no other person has any share in it. Another kind is that in which *Wāqif* along with his descendants may be the beneficiary. A third kind may be in which the descendants are the beneficiaries but with this condition that the first generation has preference over the second and no person from the second generation is eligible to share the benefit unless all persons from the first generation are exhausted. Still a fourth kind may be in which the distribution is *per stripes* and not *per capita*, with the result that the share of each stripe becomes heritable in that line. (PLD 1970 Lah. 341, DB).

'Waqf 'alal-awlād' is a Muslim religious institution protected by Constitution : Debutter and Waqf are ancient institutions of religious origin, wherein dedication of the property included in the endowment is to the Almighty. In the case of *waqf 'alal-awlād*, the ultimate dedication is of a

similar nature, although the immediate beneficiaries are usually the creator of the Waqf and his direct descendants, and it is protected under Constitution, 1956, Art. 18. (PLD 1968 S.C. 185—20 DLR (SC) 144.)

Section 213. Waqf which completes itself in the lifetime of the Waqif cannot be abrogated. But the Waqf created through a will may be abrogated by the Waqif at any time before his death.

Abrogation
of Waqf

COMMENTARY

The Waqf that has become absolute in accordance with *Shari'ah* cannot be revoked by the creator. Indeed, the Waqf, that has not yet come into existence (as through will it shall come into existence after the death of the creator of Waqf) may, at all times be revoked during the lifetime of the creator of Waqf. It has all the characteristics of *Hiba bil-wasiyyah*.

Imam Sarakhsi in his noted book, "*Al-Mabsut*" writes, "To fix a time in Waqf tantamounts to a condition fixing a time in sale. It shall make the Waqf void."⁶⁶

Egyptian Law :

Under the Egyptian Law, as in force, the Waqif has the right of resuming (revoking) his Waqf under certain conditions laid down in the Waqf Act, 1946.

Section 214. (1) The Waqif shall have the right of reserving the office of Mutawalliship of the Waqf to himself or for any other person or persons in succession.

(2) In the absence of such non-specification the Waqif shall be considered to be its Mutawalli, and after him the right of Mutawalliship shall pass to his executor, if appointed, and after him to the State.

COMMENTARY

The Waqif, according to Islamic Law, is entitled to constitute himself as the Mutawalli of the Waqf.⁶⁷ He is also entitled to specify in the

⁶⁶Ibid, p. 41.

⁶⁷Shaykh Nizam al-Din: op. cit., vol. ii, p. 332; Ibn al-Humām: op. cit., vol. v, p. 67; Ibn Nujaym: op. cit., vol. v, p. 344; Ibn Abidin: op. cit., vol. iii, p. 396.

Waqf Deed the manner, the conditions, and a period, in respect of the appointment of a person or the group of persons as Mutawalli or appointment of certain person or the group of persons who shall be entitled to appoint Mutawalli. If no express or implied instruction is found in the Waqf Deed about the appointment of a Mutawalli or his successor, the Waqif himself shall be entitled to appoint the Mutawalli. After his death, his executor and after the death of the executor the Court shall have power to appoint a Mutawalli.⁶⁸

The Waqif has the right of nominating the Mutawallis in succession. If he does not nominate the Mutawallis name by name, he may direct the appointment of Mutawallis from a particular group. He also has the right of authorising the Mutawallis to appoint their successors.

Imam Sarakhsi has in his book "Al-Mabsut" said : "If the Mutawalli of a Waqf dies in the lifetime of the Waqif, the right of appointing another Mutawalli shall be that of the Waqif himself. He may appoint whomsoever he likes.

The Mutawalli of Waqf is in the capacity of an assistant to the Waqif so that he may carry on management for the benefit of those in whose favour the Waqf has been created. After the death of the Waqif, if the Mutawalli also dies appointing an executor, he shall be the substitute of the Mutawalli. If, however, a Mutawalli dies without appointing any one as his executor, the right of appointing the Mutawalli shall devolve upon the Qāḍī, (the State). The State appoints such official for the very purpose that if a person is unable to perform his duties the official shall take care of that. When the Waqif is dead and is unable to carry out himself the purpose of Waqf, the official (Qāḍī) shall have the power of appointing the Mutawalli. As long as there is a person of the family or of the issues of the Waqif present, and has capabilities of being a Mutawalli, no stranger should be appointed as Mutawalli. If the Waqif places no such condition the official is at liberty to appoint even a stranger as Mutawalli, if it appears to him more expedient. If, however, the purpose of the Waqif is that Mutawalliship remains confined to his issues and family members, with the view that the Waqf be ever referable to his person or that his issues shall remain more careful about the Waqf than the strangers, he should mention the condition in the Waqf Deed so that the official of the time may not violate the condition. If there be no such person present amongst the relatives of the Waqif,

⁶⁸Al-Haskafī: op. cit., vol. iii, p. 396; Ibn Nujaym: op. cit., vol. v, p. 237-38; Ibn al-Humām: op. cit., vol. v, p. 58-60.

some strnnger may, then, be appointed as Mutawalli, but whenever, thereafter, a member the Waqif's family capable of being a Mutawalli, is available the Mutawalliship shall be restored to him.⁶⁹

Egyptian Law :

In the Egyptian Law of Waqf, 1946 the provisions relating to the management of Waqf are stated under sections 44 to 55.

Pakistan Rulings :

Endowed property, Government or Court has power to administer property, appointment of administrator may be made by State : "Muslim Law has always recognised the authority of *Qaḍi* or the ruling power over Waqf properties and this authority is always available to administer and manage a Waqf. Therefore property belonging to an endowment is legally subject to the control of the ruling power. Endowed property is not subject to inheritance and appointment in the absence of the appropriator or his executer". (PLD 1966 (W. P.) Lah. 978, DB).

'Mujawars'—Duties of and distinctions between office of 'Mujawar' and 'Mutawalli' or 'Sajjada Nashin' : "A *Mujawar* is a care-taker of a shrine or a mosque or similar institution; he may also sweep the premises. The position of a *Mujāwar* is different from that of a *Mutwalli* or a *Sajjāda Nashin*. The former is Manager or trustee of a Waqf property whereas the latter holds the position of a religious preceptor as does the *Imam* of a mosque who leads the prayer at a congregation or officials at religious services like marriages and funerals and is, therefore, a religious official, unlike a *Mujāwar*, whose main duty is to take care of a Shrine." (PLD 1966, Lah. 978, DB).

'Mujawar'—Nature of office of person performing duties of office of 'Mutawalli' or 'Sajjada Nashin' must be treated as such though he is described as 'Mujawar' : "Whatever might be the true legal position of a *Mujawar* under Muslim law it must be conceded that no matter by what name or appellation the holder of a particular office is called, one must look to the substance of the acts actually performed by him and not merely to the form of name and gather as far as possible from the evidence in the case as to what are the real functions in fact performed by such a person whether they are called *Mujawars* or *Sajjada Nashins* or *Mutawallis*. If they are, in fact, performing functions, which are normally performed by *Sajjada Nashins* or *Mutawallis*, then it ought to make no difference, merely because they are not

⁶⁹Al-Sarakhsī: op. cit., vol. xii, p. 44.

given that appellation but are described in some other way". (PLD 1971 S.C. 376—Law Notes 1971 S.C. 478.)

‘Mutwalli’ has power to recover possession of Waqf property : “A Mutwalli is entitled to sue for possession though the property is not vested in him because the right asserted by a suit brought to recover the Waqf property held adversely to it, is the right of the Waqf itself.” (Law Notes 1969 Lah. 3.)

‘Malikana’ rights, not fit subject of ‘Waqf’ : “Under Muslim law it is doubtful whether, *Malikana* rights could at all be dedicated by way of Waqf. The concept of Waqf in Muslim law permits dedication of the corpus (“*Aṣl*”) as Waqf but not the income or the fruit of the property.” (Law Notes 1970 Lah. 250.)

No provision in deed of ‘Waqf’ for religious, charitable or pious—‘Waqf’ is invalid : Where the deed of Waqf has not even made a provision for the benefit of the *Wāqif*’s family and no reservation has been made therein for the purposes recognised by the Muslim law as religious, pious or charitable, a provision is made by the *Wāqif* for feeding the persons who might be present at his death and burial but the said provision is not for such charitable purpose of permanent character as to make the Waqf a valid and legal one, the Court held that the Waqf is not a valid Waqf under Muslim Law. (1971 DLC 137.)

Where the *Wāqif* only makes a reference of the fact that after the extinction of the heirs of the beneficiary, the income will revert to the Waqf Estate. But no where it has been said that this income will be spent towards pious, religious and charitable purposes. Unless such provisions are expressly made in the document itself, the Waqf is not a valid Waqf. (Law Notes 1969 Dacca 19, DB).

Dedication of property as Waqf : In the case of Muhammad Saeed vs. Munawwar Shah the Peshawar High Court held “The principles of law which have been laid down are that if by scrutinizing a deed, the Court comes to the conclusion that the property had been effectively dedicated by the Waqif, then the subsequent breaches of the Waqf (i.e. Waqif’s subsequent conduct) would be immaterial. On the other hand, if it is found that the Waqif had no intention to dedicate the property and that there was evidence that he had never acted upon the Waqf deed or had dealt with the property as his own, then the Court would be justified to draw an inference that no dedication to Waqf was ever intended by him and that the deed was merely designed to provide a shield against possible claims which the Waqif anticipated might be made against him. (PLD 1973 Peshawar Notes 80).

Mutawalli etc.—Devolution of interest: In the case of Chief Administrator Awqaf vs. Muhammad Khurshid it was held by the High Court of Sind that “Khanqahs have generally sprung up in the following way :—

A *Dervish* or a person who, by leading a pious life, has won the esteem and veneration of the neighbourhood, or a Sufi of particular sanctity has settled down in some locality. So long as he has not attained sufficient importance, his place of abode is called a *takia*. But when he is a man of importance or has attained sufficient eminence, it is designated as *astana*. His pious life and religious ministrations attract public notice, disciples gather around him, and a place is constructed for their lodgment. And the humble *takia* grown into a *khanqah*. After the death of the holy personage, the spot where he is buried becomes a shrine and an object of pilgrimage not only for his disciples, but for people of distant parts, both Musalmans and Hindus, and is designated either as a *dargah* or *astana* or *rauzah*. And grants have been made by pious chiefs and sovereigns to these holy men for their maintenance and the maintenance of their descendants in perpetuity and the performance of pious acts.

Ordinarily, property devolving upon the *Sajjada Nashin*, in his capacity as such office-holder, would be property pertaining to the shrine, unless there is evidence to show that any part of the property in dispute was in fact private property, not appropriated to the purposes of the shrine.

A distinction has to be drawn between two types of cases, namely :—

- (a) where the private property acquired by a member of a religious sect with his own money or by his own exertions cannot be inherited by his natural heirs according to the tenets applicable to the sect, and must of necessity devolve upon his *Chela* ; and
- (b) where the personal and the spiritual capacities of the members of the religious sect concerned do not necessarily merge with each other according to the law or custom applicable thereto, and private property is capable of inheritance by his natural heirs. In the first case, devolution from *Guru* to *Chela* would not give rise to a presumption regarding the religious nature of the property, for the reason that even the private or self-acquired property of the *Mahant* has to devolve in exactly the same manner as Waqf property on his *Chela*. In these circumstances, secular property would not lose its character merely by such devolution unless there is evidence of dedication. However, this reasoning cannot apply to the second case where private inheritance is permissible. If the property in dispute is not inherited

by the natural heirs but instead devolves upon the spiritual successor or *Chela*, to the exclusion of the natural heirs, the presumption must clearly be raised as to its religious or Waqf character, as otherwise there would be no explanation for its devolution from *Guru* to *Chela*. In such a case there is no escape from the conclusion that the property must be regarded as one attached to the shrine or the institution of which the holder of the property for the time being is the *Mahant* or *Sajjada Nashin* or *Gaddi Nashin* or *Mutawalli*, as the case may be. The position which further emerges from a study of the cases relating to Muslim shrines is that a *Khanqah* is a recognised spiritual institution among the Muslims, and the *Sajjada Nashin* for the time being is not only the religious preceptor of the followers and disciples of the founder *saint*, but he is also the *Mutawalli* and the manager of the properties appurtenant to the shrine; that the grants made to the *Sajjada Nashin* for his maintenance are in fact grants to the institution; and that if the properties have descended from one *Sajjada Nashin* to another, to the exclusion of the natural heirs, then they must be deemed to be Waqf property and not the private properties of the *Sajjada Nashin*. There is, thus, in relation to Muslim shrines and institutions, no room for the argument that devolution of property from one *Sajjada Nashin* to the other, to the exclusion of their natural heirs would necessarily give rise to a presumption regarding the Waqf nature of the property. In regard to such institutions this presumption is inescapable in the circumstances.

The mere mention of the *Mutawalli* or *Sajjada Nashin* as the owner of the property in the revenue records does not mean that he has any personal interest therein. (PLD 1973, Note 97, Karachi).

Section 215. Any person, man or woman, is eligible to the Mutawalli's Mutawalliship of Waqf who is adult and of sound Capability mind, not known to be given to debauchery and immorality, and is trustworthy and capable of carrying on the management, either personally or through an agent.

COMMENTARY

Every person, man or woman, follower of any faith may be a Mutawalli, provided he is adult and not of unsound mind. For Mutawalli-

ship it is not a condition that one should necessarily be a Muslim or a free man. A slave or an infidel too may be appointed Mutawalli.⁷⁰

If the Mutawalli is given to debauchery and immorality he may be dismissed but (unless expressly done so) he shall not stand dismissed on account of such bad character till he attains majority.⁷¹

If a Mutawalli is minor or insane his appointment shall be void *ab initio*. If the office of Mutawalliship is inherited by a minor, the court shall, during his minority appoint another person as Mutawalli for the management of Waqf.⁷²

Section 216. If a Mutawalli is incapable of carrying on the duties of a Mutawalli the court shall have the power of removing him on reasonable grounds.

At the time of appointing a Mutawalli, however, the court as far as possible shall have regard to the wishes of the creator of Waqf and shall appoint, as far as possible, a suitable person as Mutawalli from the family of the Waqif.

COMMENTARY

If the Waqif reserves the Mutawalliship for himself and also makes a condition that the government or the court shall have no right of removing him from the Mutawalliship, the condition shall not be binding and the court shall have the power of removing him from the Mutawalliship in the event of the Mutawalli not proving trustworthy. Likewise, the court has the right of removing the Mutawalli whom the Waqif has appointed if in the opinion of the court another person is better suited to the Mutawalliship of that Waqf. If the Waqif makes a condition that certain person shall be the Mutawalli and he (the Waqif) shall have no right to remove him from the Mutawalliship, the condition shall be void.⁷³ According to Imam Muhammad the Waqif after appointing a person as Mutawalli has no right to remove him unless he has reserved such right in the Waqf-deed. But Imam Abū Yusuf holds that the Waqif may remove the

⁷⁰Shaykh Nizam al-Din: op. cit., vol. ii, p. 332.

⁷¹Ibn Nujaym: op. cit., vol. v, p. 244; Ibn Abidin: op. cit., vol. iii, p. 397.

⁷²Shaykh Nizam al-Din: op. cit., vol. ii, p. 332.

⁷³Ibid; Ibn Abidin: op. cit., vol. iii, p. 367-99; Ibn Nujaym: op. cit., vol. v, pp. 241-65.

Mutawalli, whenever he likes. But the final verdict (*fatwa*) is according to the opinion of Imam Muhammad.

The Mutawalli can not give up his Mutawalliship without the permission of the Waqif or the Court. So long as a person who is capable of being appointed as Mutawalli is not found in the family of the Waqif it is incumbent upon the Government to retain him as Mutawalli of the Waqf. If no one in the family of the Waqif has the capability of being appointed as Mutawalli and a stranger is consequently appointed as Mutawalli of the Waqf, but a suitable person of the family of the Waqif is thereafter found, it would be valid to remove the stranger and appoint that person as Mutawalli in his place.⁷⁴

The first option of appointing a Mutawalli is of the Waqif himself, not of the official or of the court. After the Waqif, the right of appointing Mutawalli shall be of that person about whom the Waqif has made a will to that effect. If the Mutawalli appointed by the Waqif dies after the death of the Waqif and he makes no will nor has he an executor, the court shall have the right of appointing the Mutawalli.⁷⁵

If there is a Mutawalli of a Waqf the court has no right to exercise any control over the Waqf property except when the Mutawalli refuses to exercise such control.⁷⁶

If the Waqif commits debauchery he shall be liable to be removed from the Mutawalliship. He shall, however, not stand removed by himself without being removed by the official.

If the Waqif appoints someone as Mutawalli and the Qāḍī considers his removal expedient in the interest of the Waqf, he has the power of removing him.⁷⁷

The person to whom the Waqif entrusts Mutawalliship in his lifetime as well as after his death, that person shall be deemed to be a representative of the Waqif in his lifetime and an executor after his death. If the creator of Waqf, in such circumstance says "I appoint you Mutawalli of this Waqf till my life" his Mutawalliship shall continue till the Waqif's life only; he shall not continue as Mutawalli after his death. If the Waqif has not appointed a Mutawalli or Qayyim (caretaker) and the official of

⁷⁴Shaykh Nizam al-Din: op. cit., vol. ii, p. 333; Al-Haskafi: op. cit., vol. iii, p. 422-23.

⁷⁵Ibid; Ibn Nujaym: op. cit., vol. v, p. 236.

⁷⁶Shaykh Nizam al-Din: op. cit., vol. ii, p. 332.

⁷⁷Ibid.

the time after appointing a Qayyim (caretaker) passes an order making him the Mutawalli, the Waqif shall, then, have no right of removing the Mutawalli and of appointing one himself. If the Waqif appoints Mutawalli of his Waqf for both the periods i.e. the period of his life and the period after his death, thereafter at the time of his death, makes a will about the Mutawalliship in favour of another person, in such a case according to Imam Muhammad, the executor shall be considered to be a Co-Mutawalli in control of the Waqf property and the Waqif shall be considered to have appointed two Mutawallis of the Waqf.⁷⁸ This writer, however, differs with this.

Section 217. (1) The Mutawalli of Waqf property shall have Sale and exchange of the Waqf property no authority to sell, mortgage, effect exchange or transfer the Waqf property in any manner, without direction or permission of the court, except when he has been expressly authorised to do so through the Waqf deed.

(2) In case the Waqf property is residential the Mutawalli, in the absence of any instruction to the contrary in the Waqf Deed, is entitled to give it on rent for a maximum period of one year. If it is an agricultural land he is entitled to give it on lease for a period of three years. For leases longer than prescribed it shall be incumbent to obtain permission of the court.

COMMENTARY

Waqf property, except in the following cases, cannot be transferred :-

- (1) When the right of mortgaging, selling or effecting exchange of the whole or a part of the Waqf property is given in the Waqf deed.
- (2) When the court having jurisdiction gives permission of mortgaging, selling or effecting exchange of the Waqf property on proper grounds which may better secure the purpose of the Waqf.
- (3) The court may, on reasonable grounds, permit the Mutawalli to lease out agricultural and non-agricultural lands for more than the prescribed periods of three years and one year respectively though the Waqif may have clearly prohibited the Waqf property being leased out for more than the said periods.

⁷⁸Ibid.

Other Stipulations :

If the creator of Waqf makes a condition in the original Waqf that he shall have the right to sell, whenever he likes, the Waqf property, and purchase from sale proceeds thereof another property and create its Waqf, such a condition shall be valid. But the Waqif after once effecting this exchange shall have no right of repeating the process except when expressly so authorised by the Waqf deed.⁷⁹

If the Waqif makes a condition for exchange but specifies no property with which the exchange is to be effected (whether it be land or building or other properties) in such circumstances, he shall have the right of effecting exchange with similar property. If the Waqif has not specified any city or village for making the purchase for exchange he shall have the right of purchasing the property anywhere.⁸⁰

If he has made the condition that in place of the Waqf property he shall purchase land or building, he shall have to purchase only in accordance with it. Similarly, if he stipulates that he shall make the exchange in Baṣra, his right of making the purchase shall be limited to Baṣra. However, if there is a land elsewhere better suited than the land in Baṣra it may be validated on the ground of expediency.⁸¹

It is stated in the book, *Qunya* that the exchange of Waqf building with one in the same Mohalla is preferable except where the locality of exchange has superiority over the Waqf place. Acting against this principle shall not be valid.⁸²

If the Waqif makes a condition that he shall have the right of effecting exchange and then appoints an agent for the job it shall be valid. (But an executor, even if so authorised in the will, shall have no right to effect the exchange). If the Waqif makes the condition that he himself jointly with

⁷⁹Shaykh Nizam al-Din; op. cit., vol. ii, p. 330; Ibn Nujaym: op. cit., vol. v, p. 239-40; Ibn Abidīn: op. cit., vol. iii, p. 399; Al-Khassaf (d. 261 A.H.): *Aḥkām al-Awqāf*, p. 154; Ibn al-Humam: op. cit., vol. v, p. 58.

⁸⁰Shaykh Nizam al-Din: op. cit., vol. ii, p. 330; Ibn Abidin: op. cit., vol. iii, p. 399; Al-Khassāf: op. cit., p. 154; Ibn al-Humām: op. cit., vol. v, p. 59.

⁸¹Shaykh Nizam al-Din: op. cit., vol. ii, p. 330; Ibn Nujaym: op. cit., vol. v, p. 240; Ibn Abidīn: op. cit., vol. iii, p. 399; Ibn al-Humam: op. cit., vol. v, p. 59.

⁸²Shaykh Nizam al-Din: op. cit., vol. ii, p. 330; Ibn Nujaym: op. cit., vol. v, p. 241.

someone else shall have power to exchange that someone shall not be entitled alone to effect the exchange. However, the Waqif in this case even individually shall be entitled to effect the exchange. If he makes the condition that whosoever shall be the Mutawalli of the Waqf shall have the right of effecting the exchange this condition shall be valid and every Mutawalli shall have a right to do so. If the creator of Waqf has stipulated that a certain person shall have the right of effecting exchange and the Waqif dies, that certain person, after the death of the Waqif, shall have no right of effecting the exchange except when the Waqif had expressly authorised that person in the Waqif's life and after death to do so.⁸³

As long as the Waqif does not stipulate in favour of the Mutawalli, that he shall have the right of effecting exchange, he shall not have the right of effecting exchange. If he lays down that condition in favour of Mutawalli but does not specifically reserve such right for himself, he shall yet have that right.⁸⁴

When the Waqf declaration and the exchange of Waqf property after sale, are proper, the sale shall be valid even if the Waqf property is sold (*bonafide*) at lower than its market price. But if the price, it fetches, is so low that it be unacceptable as normal the sale shall not be valid. Besides, in such deals cash consideration only shall be valid. Any other form of consideration shall not, on approved verdict, be valid.⁸⁵

If the condition laid down is that the Waqf property shall, after sale, be replaced by a better property its implementation shall depend upon the discretion of the Court.

If the Waqif reserves for himself powers in that behalf he shall have the right of diminishing or increasing functions or purposes of Waqf or of striking off or adding in the number of beneficiaries the condition shall be valid. The Mutawalli shall have such powers only when the

⁸³Shaykh Nizam al-Din: op. cit., vol. ii, p. 330; Ibn Nujaym: op. cit., vol. v, p. 240; Ibn Abidīn: op. cit., vol. iii, p. 400; Ibn al-Humām: op. cit., vol. v, p. 59.

⁸⁴Shaykh Nizam al-Din: vol. ii, p. 330; Ibn Nujaym: op. cit., vol. v, p. 240; Al-Khassāf: op. cit., p. 24.

⁸⁵Shaykh Nizam al-Din: op. cit., vol. ii, p. 330; Ibn Nujaym: op. cit., vol. v, p. 240; Ibn Abidīn: op. cit. vol. iii, p. 410-11; Al-Khassāf: (d. 261 A.H.): *Al-Aḥkām al-Awqāf*, Cairo, 1322 A.H., p. 154; Ibn al-Humām: op. cit., vol. v, p. 59.

Waqif confers it on him as well.⁸⁶ Imam Khassaf writes in '*Ahkam al-Awqaf*' that the above referred condition when laid down with the aforesaid words, the Waqif shall have the right of changing, diminishing, increasing, striking off or exchanging in exercising such powers only once and not thereafter. But if he desires to exercise them repeatedly throughout his life, he ought to use such words that may convey the sense of his being so authorised. He may likewise confer such powers in favour of others.⁸⁷

Laying down conditions by the Waqif to be observed during his own Mutawalliship by himself and after him by the Mutawalli shall be valid. If he lays down a condition that during his (Waqif's) life the Mutawalli shall have powers in certain matters, the Mutawalli after the death of the Waqif, shall have no right to exercise such powers.⁸⁸

In the above case the said Mutawalli shall have no power to assign any of this powers to any other person nor to make a will in respect of those powers.⁸⁹

If the Waqif creates Waqf in the name of God and makes a condition that its produce (income) shall be spent howsoever he desires, the Waqf and the condition shall be valid. But if for the first time he spends its income on paupers or on pilgrimage or on any specified person, thereafter his spending the income on any other item shall not be valid. If, however, he makes a Waqf of it for certain person or gives it to certain person but spends the income on his own person, then, according to the assertion of a noted jurist Hilal, the Waqf shall be void. Similarly if he creates the Waqf for his issues he shall not be entitled to spend from its income on himself.⁹⁰

⁸⁶Shaykh Nizam al-Din: op. cit., vol. ii, p. 330; Ibn Nujaym: op. cit., vol. v, pp. 241-42; Al-Khassāf: op. cit., p. 23.

⁸⁷Shaykh Nizam al-Din: op. cit., vol. ii, p. 330; Ibn Nujaym: op. cit., vol. v, p. 242; Al-Khassāf: op. cit., pp. 24-25.

⁸⁸Shaykh Nizam al-Din: op. cit., vol. ii, p. 330; Ibn Nujaym: op. cit., vol. v, p. 244; Al-Khassāf: op. cit., p. 25.

⁸⁹Shaykh Nizam al-Din: op. cit., vol. ii, p. 330; Ibn Nujaym: op. cit., vol. v, p. 244; Ibn al-Humām: op. cit., vol. v, p. 59.

⁹⁰Shaykh Nizam al-Din: op. cit., vol. ii, p. 331; Ibn Nujaym: op. cit., vol. v, p. 242; Hilal b. Yahya Al-Ra'ī (d. 245 A.H.): *Aḥkām al-Waqf*, Cairo, pp. 291, 298 to 300.

In the above case, if the Mutawalli dies before spending the income it shall continue to be distributed among the beggars.⁹¹

If a person creates Waqf of his land with the condition that its Mutawalli may give away its income to any person he likes, the Mutawalli shall have the power to spend its income on the poor or the rich whomsoever he likes. If one, during his death-illness, creating a Waqf says that certain person shall have the right of spending the income of the Waqf property on whomsoever he likes and the executor spends it on the issues of the Waqf, this act of the executor shall not be valid. The stipulation of the Waqf shall be void and the Waqf shall be considered to have been created in favour of beggars.⁹²

The Waqf is at liberty to stipulates that the beneficiary, as long as he remains a follower of certain religion, shall get the income of the Waqf property. The moment he gives up that religion and accepts another religion he shall be considered to have been excluded from Waqf. This stipulation shall be valid.⁹³

The Waqf stipulates that of the relatives in whose favour the Waqf is created the one who goes to Baghdad (i. e. to another place) and lives there, shall be excluded from the entitlement of the Waqf's income. This stipulation shall be valid. When, however, the said beneficiary returns to the town of the Waqf and lives there he shall be again entitled to get the income.⁹⁴

If the Waqf stipulates that the Mutawalli shall not let out (*ijarah*) the Waqf property and if the Mutawalli, thereafter, does so the *ijarah* shall be void. Similarly, if he stipulates that the Mutawalli shall not deal in the fruit bearing trees that stand on the Waqf land, or that the Mutawalli on letting out the Waqf property shall be deprived of the Mutawalliship. On contravention, the Mutawalli shall be deprived of the Mutawalliship and he shall have the right of appointing someother trustworthy person as Mutawalli. Similarly, a stipulation that if any of the beneficiaries acts in a manner that defeats the Waqf he shall be excluded from beneficiaries of the Waqf, shall be valid and the person so acting shall be considered to

⁹¹Shaykh Nizam Al-Din: op. cit., vol. ii, p. 331,

⁹²Ibid.

⁹³Ibid, p. 332,

⁹⁴Ibid,

have been excluded from the beneficiaries. In case of difference of opinion among the beneficiaries as to the act of the offending beneficiary defeating the said purpose the Qadi shall decide the matter.

If the Waqf initially stipulates that the Waqf property shall not be sold but subsequently says or writes that he shall have the right of effecting exchange thereof, he shall then have the right of effecting exchange thereof. Similarly if, at first, he says that he shall have the right of effecting exchange and, thereafter, he says that he shall not have that right, his latter stipulation shall be given weight and it shall be considered to have abrogated the first one.⁹⁵

If a person at the time of his creating Waqf stipulates that he has the option of abrogation within three days i.e. stipulates for an option, in such a case, according to Imam Abu Yusuf, the Waqf and the option both shall be valid. According to another opinion of his, the Waqf shall be valid and the stipulation shall be void. But according to Imam Muhammad both the Waqf and the stipulation shall be void.⁹⁷ That is, due to this stipulation, the Waqf shall not be created.

Imam Sarakhsi has, in his book, "*Al-Mabsut*" reports that, when a Waqif stipulates that an exchange of the Waqf land may be effected and he shall effect the exchange whenever he shall like, then according to Abu Yusuf this shall be valid. According to Muhammad and the jurists of Baṣra the Waqf shall be valid, but the stipulation shall be void. The reason according to the latter is that the failure of Waqf does not necessarily follow such a stipulation as the natural character of Waqf as to perpetuity is not thereby lost. The Waqf, therefore, shall be absolute and the stipulation about exchange shall be considered as spurious and shall be held to be void.⁹⁸

Egyptian Law :

Under the Egyptian Law of the Management of Waqf enacted in 1946 the relevant provisions concerning the exchange of Waqf property and its assets etc. are stated as under :—

- (14) On demand of respectable persons the Department shall purchase property out of assets that are received by the Department in

⁹⁵Ibid; Al-Khassāf: op. cit., p. 270.

⁹⁶Ibn Nujaym: op. cit., vol. v, p. 242; Al-Khassāf: op. cit., 232.

⁹⁷Ibn al-Humām: op. cit., vol. v, p. 59.

⁹⁸Al-Sarakhsi: op. cit., vol. xii, p. 42.

exchange for the Waqf property. And such property shall be the substitute of the original Waqf property. The Department shall also have the right of allowing the utilisation of these assets in the procurement of new sources of income. It shall also have the right of utilising or allowing the utilisation of the exchanged assets in a manner that the same may become the means of increasing the property. Whatever form such means take they must be valid under the Shari'ah.

- (15) If a demand about an effect received in exchange of the Waqf property and deposited in the treasury of the Department of Shari'ah is made under the provisions of the previous Section by persons entitled to it and a period of one year has elapsed since taking effect of this Act, the Department of the Government of Egypt shall have the right, on the requisition of the Minister of Justice, of purchasing from these effects, movable or immovable property or of allowing the purchase to be made of such property. Such permission shall be acted upon in accordance with procedure described in paragraphs 3 & 4 of Section 7. And that whatever shall be purchased or constructed shall be deemed to be included therein like other Waqfs.

And the Department shall have the right of appointing a caretaker and manager to keep watch on its income and its realisation and custody.

- (18) When the Waqf property in part or whole falls in disrepair or is destroyed and neither its construction nor exchange beneficial to the beneficiaries according to their shares be possible and their deprivation from its income for some time be not much harmful to them the Waqf shall be considered to have come to an end, just as when the income of the share of any beneficiary coming to an end, the share is considered to have terminated. But such termination must take effect through the resolution of the Department in accordance with the demands of the beneficiaries under the Waqf or of the respectable persons. Whatever part of the Waqf property shall have been thus released from Waqf shall be held to be the property of the Waqif, if he is alive, otherwise under the order of the Department it shall become the property of those persons who are alive and are entitled (beneficiaries) to the Waqf.

- (54) The Mutawalli shall every year reserve twenty-five percent of the income from the Waqf property for construction work of the Waqf property. The rest of the income he shall deposit in the treasury of the Department. So long as the construction continues he shall have the authority of adopting any measures to raise income from the rest of the fund; but spending of construction and the reserve fund by him shall not be valid without his obtaining permission of the Department.

But spending by the caretaker of any part of the reserved income purely from agricultural land shall not be valid until the official in charge does not permit him to spend the reserves which shall be spent on improvement of and addition in the land or on the re-adjusting of its boundaries or on the supply of the agricultural implements, or the income be used according to the conditions laid down in the Waqf or when the respectable persons of the community so demand.

The caretaker as well as each of the persons entitled in the Waqf, when he considers advisable, has the right to place before the Department, the necessity of amending the method of investing the amount of Waqf's income and the Department, if considers it so, may in accordance with their wishes cancel the method of saving or fix a moderate amount for such method. These provisions shall be applicable when the Waqif has laid down no condition inconsistent with it.

- (55) In accordance with the above Section when the Waqf property wholly or partly stands in need of reconstruction and more than one-fifth of the yearly income has to be spent on it and those entitled in the Waqf are not agreeable to such construction (though the Waqif may or may not have made clarification of the condition) it shall be incumbent upon the Mutawalli to place the matter before the Department so that the Department, which holding the claim of the beneficiaries not maintainable, may direct that a part of the income be spent on its construction, or that so much of it be reserved which may be utilised on its construction as and when required. These provisions shall also apply for making any addition in the Waqf property in accordance with the conditions laid down by the creator of Waqf.

Keeping in view the provisions of Section 18, it shall be valid for the Department to sell some of the Waqf property for the

reconstruction of Waqf, whenever the expediency demands it when its restoration be not possible out of its income.⁹⁹

Section 218. In the absence of any direction in the Waqf deed every Mutawalli shall, in his death-illness or otherwise, be entitled to nominate his successor but no Mutawalli in his lifetime shall have the right of transferring the office of his Mutawalliship to any other person.

The right of
appointing
successor

COMMENTARY

If there is no specification in the Waqf Deed of any right to the Mutawalli of appointing another person as Mutawalli, the Mutawalli shall have no right of appointing a permanent Mutawalli. However he may, in his lifetime, allow any other person as Agent to work for him. Death-illness is not an essential condition in the appointment of an agent by the Mutawalli of Waqf. It shall be valid for the Mutawalli to appoint, in his sound health, any person as his agent or shoulder his administrative responsibilities. It shall also be valid for the Mutawalli to fix a portion of the allowance of Mutawalliship for the agent in consideration of his performing the duties as his agent. It shall also be valid if he removes the agent and in his place appoints another person as his agent. The appointment of the agent stands terminated on the death or incapacity of the Mutawalli. The right of appointing Mutawalli shall then vest in the State.¹⁰⁰

Section 219. Unless there is a clear authority in the Waqf Deed no Mutawalli shall have the right of borrowing for the Waqf without the permission of the Court. If the Mutawalli has under legitimate necessity, contracted a debt the Court on the necessity being later proved, shall have the power of sanctioning the debt as valid.

The right of
borrowing

COMMENTARY

It should be clearly understood that the incurring of debt for the Waqf by the Mutawalli about which no permission has been obtained by him from the Court, has been termed by the jurists as "*Istidanat*". It means that when the Mutawalli has nothing with him out of the income of Waqf, and

⁹⁹Qanun Tanzīm al-Awqāf, Egypt 1946.

¹⁰⁰Ibn Abidīn: op. cit., vol. iii, p. 451; Ibn al-Humam: op. cit., vol. v, p. 69.

under the necessity contracts a debt for a fixed period such debt unless, ratified by the Court, shall not be valid.

If, however, the situation is that the Mutawalli has the income of the Waqf with him. In spite of that, due to some reason, he spends his personal funds for the Waqf thinking that he would afterwards reimburse himself from the Waqf's income. In such circumstances, it is not necessary to seek permission from the Court and he may recover the said sum from the Waqf's income. Some jurists have held that in such situation if the Mutawalli has declared his personal sum as a loan, he shall, then, have the right of reimbursement from the Waqf's income. If he has not so declared he shall not have the right of realising it back from the Waqf's income. But the correct position is that he has the right of taking back the same in all such cases.¹⁰¹

Section 220. (1) It is valid for the Waqif to authorise the
Remuneration of Mutawalli Mutawalli and his successors to take a fixed remuneration out of the income of the Waqf property.

(2) But no successor mutawalli (except the first one) shall be entitled to realise the remuneration fixed for Mutawallis in the Waqf deed without the permission of the Court, unless the intention of the Waqif appears otherwise from the contents of the Waqf deed.

(3) Whatever fixed sum the Waqif authorises the Mutawalli in the Waqf Deed to realise as his remuneration, he shall realise from the income of the Waqf. But on account of this right of such realisation, the Mutawalli shall not be authorised to get the Waqf property attached or put to auction under a decree.

(4) If no remuneration has been fixed in the Waqf Deed the court may on an application by the Mutawalli fix the remuneration and authorise him to realise the same.

¹⁰¹ Ibn Abidin: op. cit., vol. iii, p. 460; *Al-Durr al-Muntaqa* (o. m. o. *Majma' al-Auhur*, Cairo, 1327 A.H., vol. i, p. 739; Shaykh Nizam al-Din: op. cit., vol. ii, p. 337.

COMMENTARY

If the Mutawalli for whose services a remuneration is fixed, falls ill and becomes unable to carry on or get performed the duties attached with the Waqf, the remuneration fixed for him shall lapse. If he, however, is unable to perform duties himself but is able to get the duties discharged under his directions, in such event, he shall not be deprived of his remuneration.

The official of the time shall also have the right, if necessary, for the Waqf, to associate on his behalf another person as Mutawalli with the Mutawalli already appointed, and fix from the income of the Waqf remuneration for him besides the remuneration of the first Mutawalli. But the official shall not have the authority of reducing the remuneration, even if it is excessive, fixed by the Waqf for the Mutawalli.

If the Waqif has fixed the remuneration of a Mutawalli saying that the remuneration shall be given to the Mutawalli irrespective of the Court dismissing him from the Mutawalliship and that his issues after him shall in succession get the same remuneration the stipulation shall be valid and enforceable.¹⁰²

Section 221. (1) All the expenditure incurred by the Mutawalli, for permanent preservation of the Waqf and not being contrary to the legal stipulations of the Waqif, shall be valid.

(2) If a person without right and authority undertakes the management of Waqf, he, under law, shall be considered to be a trustee and shall, in respect to Waqf, be responsible for all his acts.

COMMENTARY

The foremost duty of a Mutawalli is to keep the buildings of Waqf in good repairs using the income of Waqf. Thereafter, if the Waqf is burdened with debts, he shall, with the permission of the court, try to pay it off from its income. It is also necessary for the Mutawalli that in all his dealings with the Waqf property he should be mindful of the betterment of Waqf. It does not behove him to act with negligence in matters wherein he is made to act.¹⁰³

¹⁰²Ibid, p. 338.

¹⁰³*Al-As'āf*: Cairo, Matba' Bawlāq, (1292 A.H.), p. 47; Ibn Abidin: *Radd al-Muhtār*, Cairo, (Matba' Bawlāq), 1299 A.H., vol. iii, p. 562.

The Mutawalli is in all circumstances bound, with few exceptions, to act in accordance with the conditions laid down by the creator of Waqf. He shall have the right of letting out on rent the Waqf's shops, houses, lands, etc. in accordance with the conditions laid down by the Waqif. The beneficiaries, in fact, shall not have this right and it is the Mutawalli alone who shall have the right of realising the rent. If a Mutawalli is dismissed after leasing out a land, his successor shall have the right of realising the rent.¹⁰⁴ It is also valid for the Mutawalli to cultivate the land himself and purchase agricultural tools and other impliments and pay wages to the labourers from Waqf income. He shall also have the right of settling the farmers on land, if necessary, for cultivation and enhancement of its income.¹⁰⁵

Similarly in case the Waqf property is a garden the Mutawalli has the right to give it to others for a fixed period with the condition that the fruits of the garden shall be equally divided between the lessees and the Waqf.¹⁰⁶

If some Waqf land is so close to the vicinity of a town that the houses built over it shall be of great attraction for the lessees and the same shall fetch higher income to Waqf compared to its use as agricultural land, the Mutawalli, then, has the right to get houses built over the same, otherwise such use shall not be valid.¹⁰⁷

The Mutawalli has also the right of cancelling the lease of the leased out Waqf land if it be in the interest of Waqf, whether the lease has been created by himself or by a Mutawalli prior to him, and whatever the lease period. If a Waqf building requires construction but there is no reserve money of the Waqf, the Mutawalli may, with the permission of the Court, raise money for such construction.¹⁰⁸

If savings from the Waqf of a Mosque, after providing for the construction of Mosque and other expenses as salaries of the *Mu'adhdhin* (prayer callers), Imams and others, are available and the Mutawalli for the improvement and in the interest of the Mosque and with the permission of the Court, purchases a property so that the income for the Mosque be

¹⁰⁴Ibn Abidin: op. cit., vol. iii, p. 554; *Al-As'āf*: op. cit., p. 56; *Tanqīh al-Hamidiyyāh*, Cairo, 1300 A.H., pp. 228-31.

¹⁰⁵*Al-As'āf*: op. cit., p. 58; Shaykh Nizam al-Din: *Fatawā Alamgīrī*, Cairo, (1282 A.H.), vol. ii, p. 331.

¹⁰⁶Ibn Abidin: *Radd al-Muhtār*, op. cit., vol. iii, p. 593; *Tanqīh al-Hamidiyya*: op. cit., p. 173; *Al-As'āf*: op. cit., p. 47.

¹⁰⁷Shaykh Nizam al-Din: op. cit., Cairo, p. 332.

¹⁰⁸*Ibid*, p. 338; Ibn Abidin: op. cit., Cairo, 1299 A.H., pp. 580-93.

enhanced, this act of the Mutawalli shall be valid. But the property so purchased shall not be considered to be Waqf; hence it will be valid in case of need to sell and meet from it other expenses of the Mosque. In the same way, if the Mutawalli purchases a property from the income of Waqf and sells it and again wishes to repurchase it from the buyer on the same price he shall be entitled to do so. If the Mutawalli is dismissed and another Mutawalli is appointed in his place for him too such transaction shall be valid.¹⁰⁹

If the income from a Waqf for the poor or from Waqf for a Mosque is accumulated with the Mutawalli more than the requirements of those Waqfs, and such contingencies as war against the Islamic country arise, the State has then the option to borrow from that income and spend the same on that emergency and this shall be a debt of the Waqf on the State which later the State shall have to pay back. If Waqf is created for charity or for alms dedicated to pious uses and its income after being spent on purposes for which the Waqf is created, accumulates and there is no possibility of its being spent on further improvement of the Waqf or such improvement or repair can be deferred for over a year, then, it shall be valid for the Mutawalli to spend (the accumulated income) on such other matters of general welfare which, according to the Mutawalli, shall be frustrated if nothing is spent in time on them or that the general purpose of welfare shall become impossible. For instance, on the welfare of a group of other poor people or the ransoming Muslims from an enemy or on helping a soldier against infidels. But spending income of such Waqf on repairs of a Mosque or an inn or getting walls sunk shall not be valid. That is to say that spending on matters which are incapable of personal proprietorship shall not be valid.¹¹⁰

Illegal Utilization :

It is not proper for a Mutawalli to take the Waqf land on lease for himself or have his residence therein though he pays the same rent for it as others are prepared to pay. He, however, can do so after placing the matter before the Court and obtaining its permission. The same rule shall apply in case of leasing the Waqf property, by Mutawalli to his relatives. Moreover it is not valid for the Mutawalli to spend the income of one year in another year except when the Waqf has so stipulated. Neither it is valid for him to effect such additions to the Waqf property that make it different from that at the time of Waqf. Indeed it shall be valid to do so when

¹⁰⁹As'āf fi: *Aḥkām al-Awqāf*, op. cit., p. 47; Ibn Abidin: op. cit., pp. 562-92; Shaykh Nizam al-Din: op. cit., p. 334.

¹¹⁰As'āf: op. cit., p. 394; Shaykh Nizam al-Din: op. cit., 332.

the Waqf has specified so or the beneficiaries of Waqf express their approval on his doing so.¹¹¹

If a Waqf is created for a Mosque or an academy and the Waqf has stipulated that the Mutawalli may adopt new functions the Mutawalli can do so without the permission of the Court, otherwise this act of his shall not be valid. He shall have to refer the matter to the Qāḍī who shall be competent to permit so when the necessity and the advisability so demand.¹¹²

The statement of a Mutawalli acknowledging a debt or a thing due on the Waqf is not admissible.¹¹³ It should be proved by evidence.

The Mutawalli shall not place in trust the income of Waqf land with an untrustworthy person nor the person can be given a loan out of Waqf money except when that person can ensure protection of the income of the Waqf. If an official orders the Mutawalli to perform an act and the Mutawalli performs that act, thereafter it appears that the act was not legally correct, the Mutawalli shall not be responsible for the same.¹¹⁴

Waqf's Income :

The right of the beneficiaries in the Waqf's income arises only after it is realised. In agriculture produce such rights arise when the crop can be assessed for value and of fruit shall be created when their crop reaches a stage when there is no danger of mishap to them. If the Waqf is of a building or of a land that has been leased out, and the income thereof is received in instalments, the right shall be created therein when the instalments become due.¹¹⁵

The child who is in his mother's womb prior to the accrual of income shall be considered to be entitled to the income. If the child is born within six months of the accrual of Waqf's income or of its instalments and the child's mother is in a state of coverture or is undergoing the period of revocable divorce, the child shall be considered to be a sharer. If the child dies prior to the receipt of his share, it shall be distributed amongst his legal heirs. If he is born after six months or more after the accrual of the income

¹¹¹Ibn Abidīn: op. cit., pp. 520, 578, 594; Shaykh Nizam al-Din: op. cit., p. 336; *Tanqīh al-Hamidiyyah*: op. cit., p. 219.

¹¹²Ibn Abidin: op. cit., p. 534, 577.

¹¹³Ibid, p. 601; *Tanqīh al-Hamidiyyah*: op. cit., p. 212, 213.

¹¹⁴Ibid, p. 229; *Fatawā Anqaruya*, Cairo, 1281 A.H., p. 226.

¹¹⁵Ibn Abidin: op. cit., p. 606.

and the mother's position be the same as aforesaid, he shall not then be entitled to the Waqf's income.¹¹⁶

In Waqf *'alal-awlad* the right to income shall accrue from the time the income is created, not from the time the Waqf is created. Hence, those issues that exist at the time of accrual of the income, all of them shall be equally entitled. A child in womb is included in Waqf *'alal-awlad*.¹¹⁷

In Waqf for poor relatives, the poverty at the time of income's accrual shall be the qualifying condition. Hence, whoever is poor at that time shall be entitled to have a share in the income though he may become affluent thereafter or be affluent prior to it. If the income from Waqf remains in abeyance for two years, the indigent shall be entitled to their shares in the income of each year of abeyance and shall not be considered affluent in each succeeding year, because of their receiving of share of the income being held up in the preceeding year. Therefore, when the share in the income of the preceeding year comes in possession of the beneficiary thereof he shall not be considered to have become affluent for disentitling him; he shall remain entitled to the stipend in the following year.¹¹⁸

The right of the beneficiary is created in Waqf's net income after defraying all the necessary expenses including the *'Ushr*, *Kharaj* and repairs of buildings. As long as these dues are to be deducted from the Waqf the beneficiaries should not be given the income from the Waqf. Hence, beneficiaries in the Waqf, in accordance with the stipulation made by the creator of Waqf, shall be given their fixed shares from the net income. The beneficiary who is absent or is untraceable his share shall not be given to any other beneficiary without proper justification. When the Mutawalli comes in possession of the income of the Waqf and it is time for payment of the share the beneficiaries shall have the right of demanding their shares from the Mutawalli but prior to this they shall not have the right. It is also valid for a beneficiary, if he is under the debt of someone, that he may appoint his creditor as his representative for receiving his share from the Mutawalli. It shall, however, be invalid to assign one's future right of receiving stipend from the Waqf.¹¹⁹

¹¹⁶Ibid.

¹¹⁷Ibid, p. 609.

¹¹⁸Ibid.

¹¹⁹Ibid, p. 522; *Tanqih al-Hamidiyyah*: op. cit., pp. 188, 193-95, 294.

If a beneficiary admits that another person is entitled to that stipend and denies himself to be entitled to it and that another person corroborates him, that another person shall then be deemed to be entitled to the stipend and the first one shall be considered to be deprived permanently of his share, though this may be contrary to the contents of the Waqf Deed. When the one who makes the admission dies and the one in whose favour the admission is made is alive, the stipend shall revert according to the direction stated in the Waqf Deed by the Waqif. But it shall not be valid for the beneficiaries to allow their right to lapse in favour of another, for consideration or without consideration.¹²⁰

¹²⁰Ibn Abidin: op. cit., pp. 582, 583.

CHAPTER XXVIII

LAW OF WILLS—Bequests

Section 222. (1) Unequivocal expression of Will by a person
Definitions for the transfer of his property or of its profits, without consideration, in favour of any person or any institution, to take effect after his death, permanently or for a fixed period, is called 'a Will' (*Waṣīyyat*).

(2) The person who makes the bequest is called "the Legator" (*Muṣī*).

(3) The thing bequeathed is called "the Legacy" (*Muṣā bihī*).

(4) The person in whose favour a thing is bequeathed is called "the Legatee" (*Mūṣā lahū*).

(5) The person appointed representative of the legator to enforce and execute the Wills is called "the Executor" (*Waṣī*).

COMMENTARY

Will (*Waṣīyyat*), testament (*taṣṣiyah*) and to bequeath (*Iṣā*) are the infinitives and have the same meaning. Literal meaning of the will (*waṣīyyat*) is *ittiṣāl*, to place next or adjacent to each other. Sometimes "Legacy" too is called "will" because the same is a transaction connected with death.¹ The real meaning of 'will', however, is "asking for co-operation from one person by another so that the other person in the absence of the person asking for cooperation may perform that person's affairs as required by that other, either in his lifetime or after his death. From a 'will' it legally follows that it be effective after the legator's death. The Law of Wills in Iraq, therefore, covers only the performance of only one's affairs after his death.²

¹Zubaydi: *Taj al-'Urūs*, Beirut, vol. i, p. 392.

”هيت وصية لاتصالها بامرالميت“

²*Qanūn al-Aḥwāl al-Shakhṣiyyah*: 1959, Iraq, Sec. 75.

”الايصاء اقامة الشخص غيره لينظر فيما اوصى به بعد وفاته“

Definition of 'Will' :

Waṣiyyah or *Iṣā* under the Islamic Law refers only to ownership which relates to the time after one's death. It means settlement of property gratuitously. That is to say, it is a form of creating ownership (in another) without consideration after (one's) death. The legacy in which the proprietorship of another is created by one who dies may either be the corpus, the thing itself or its 'gains' or proceeds or emoluments, (*munāfi*).³

It is written in "*Al-Baḥr al-Rā'iq*"⁴ and "*Majma' al-Anhur*"⁵ that constituting a person proprietor of one's own property gratuitously by another person following his own death is called a 'Will'. 'Alāud-Din al-Kāsānī says "Will is an act through which one makes certain disbursement of his property absolute for the period following his own death."⁶ It is said in another noted book of the Hanafi *fiqh* "*Al-Durrul Mukhtār*" that 'Will' is interpreted to be a transfer (of property) after death.⁷ Similarly, *Kanz al-Daqaiq*" says that making a person proprietor by another with reference to a time in future following his own death is called "Will".⁸ A famous book of the Hanbali *fiqh* '*Al-Iqnā*' defines it in the words that direction for appropriation (of property) after one's death is called 'Will'.⁹

In Shi'ah *fiqh* making one person of another as proprietor of the corpus or its proceeds of his property after one's own death is called "Will".¹⁰

Qadri Pasha defining "Will" in his codification "*Al-Aḥkam al-Shar'iyya Fil-Aḥwal al-Shakhsiyya*" has written that making another person proprietor of one's property after his own death as a favour is called a "Will".¹¹ This definition has in fact, been derived from "*Al-Baḥr al Ra'iq*".

³Mahmūd Nasafi: *Kanz al-Daqā'iq*, Muḥtabai, p. 476.

⁴Ibn Nujaym: *Al-Baḥr al-Rā'iq*, Cairo, vol. viii, p. 403.

"الوصية تمليك مضاف لما بعد الموت بطريق التبرع"

⁵Damad Āfandi: *Majma' al-Anḥār*, Cairo, vol. ii, p. 691.

⁶Al-Kasānī: *Bada'i al-Ṣana'i*, Cairo, vol. vii, p. 333.

⁷Al-Haskafi: *Al-Dur al-Mukhtār*, Cairo, 1327, vol. iv, p. 458.

"هـى تمليك مضاف الى ما بعد الموت"

⁸Nasafi: *Kanz al-Daq'iq*, Muḥtabai, Delhi, p. 476.

"الوصية تمليك مضاف الى ما بعد الموت"

⁹Al-Maqdisī: *Al-Aqna*, Cairo, vol. iii, p. 47.

"الوصية الامر بالتصرف بعد الموت"

¹⁰Al-Ḥillī: *Shara'i al-Islam*, Beirut, p. 258.

"وهى تمليك عين او منفعة بعد الوفاة"

¹¹Qadri Pāshā: *Al-Aḥkām al-Shar'iḥ fil-Aḥwāl al-Shakhsiyya*, Cairo, sec. 530.

"الوصية . تمليك مضاف الى ما بعد الموت بطريق التبرع"

Modern Legislation :

In Egyptian Law,¹² instruction regarding appropriation in the estate of a deceased person after his death has been called 'Will'. In Syrian Law¹³ the definition of 'Will' is in accordance with the Egyptian Law. Similarly, in Tunisian Law¹⁴ also, making someone else the proprietor of a corpus of one's property or of its usufructs by a person to follow his death is called "Will". In Lebanon's Law¹⁵ the making of 'Will' means that a person, referring to the period after his death, makes gratuitously someone else proprietor of his legacy. In Iraqi law 'Will' has been defined as instruction of appropriation in the legacy of the deceased in consequence of which after legator's death someone else has to be made its owner without any consideration".¹⁶

Analysis :

Among the different definitions that have so far been quoted from different works on *fiqh*, the one framed by Al-Hilli appears to be preferable. Similarly, compared to those of Egyptian and Syrian laws the addition of clause "*Muqtaḏāt al-Tamlik Bila 'Iwaq*" in the definition of "Will" in the Iraqi Law is more appropriate. However, the definition codified by this author in this Section is more comprehensive than of others.

Section 223. There are two ingredients of a Will (i) Proposal
Ingredients of Will and (ii) Acceptance.

(2) Proposal or acceptance shall be valid both in writing or orally.

(3) Proposal or acceptance of a will through sign shall be valid in case of incapacity.

COMMENTARY

An ingredient is a component of an object without which complete existence of that object cannot be conceived.

¹²*Qanūn al-Wasiyyah al-Miṣri*: 71, 1964, sec. 1.

"الوصية تصرف في التركة مضاف الى ما بعد الموت"

¹³Syriya: *Qanūn al-Aḥwāl al-Shakhsiyyah*, sec. 207.

¹⁴*Majalla al-Aḥwāl al-Shakhsiyyah*, Tunis, chap. 1, sec. 171.

¹⁵Kusḃār: *Al-Waṣayā wal-ḥibat wal Irith*, p. 73.

¹⁶*Qanūn al-Aḥwāl al-Shakhsiyyah*: Iraq, 1959, sec. 64.

"الوصية تصوف التركة مضاف الى ما بعد الموت مقتضاة التملك بلا عوض"

For example, a pillar which though by itself is the part of a building but the whole building rests upon it.¹⁷

Two ingredients of Will : As every contract has two ingredients—a proposal and an acceptance—similarly a Will, being a contract, has the same two ingredients. Further, as in a contract no particular words are prescribed for a proposal, so also in a Will there are no particular words for proposal. Hence, as the real purpose of a proposal is the constitution of the contract, in a 'Will' too the purpose of a proposal is that whatever may be the words used on behalf of the legator they be specific, that he constitutes the legatee a proprietor of his property or of its usufructs after his own death. On this basis, if a person says that he wills or has made a Will of one-third of his property in favour of a certain person or says that after his death one-third of his property be given to a certain person or says that he makes a gift to a certain person or says he makes him a proprietor or he uses some such words or phrase, the proposal of the 'Will' shall be considered to have been correctly made.

Words for Will : The word "Will" in this context is definite. Other words such as 'Gift' or 'Constituting proprietor' etc. are not definite; but if they have been used with reference to a time after one's death, they are to be taken to mean a "Will".

The proposal of Will : The proposal of Will shall be considered to have been correctly made from each of such words which gives an impression that it is intended to be a "Will". Likewise, the proposal of a 'Will' from signs as well shall be considered to be valid,¹⁸ provided the signs are unambiguous and there is no other alternative. According to Islamic Law, it is not incumbent that the 'Will' be made in writing or that it must be necessarily signed or registered. A Muslim may make a 'Will' orally.

Indo-Pakistan Rulings :

Letter held as Will : In a Privy Council case a letter, which had been written by the Legator a little before his death in which, *inter-alia*, instructions regarding the transfer of his property were embodied, was held to be a

¹⁷Ibn Nujaym: *Al-Baḥr al-Rāi'q*, vol. i, pp. 266, 290 :

”الشرط.. في الشريعة ما يتوقف عليه وجود الشيء ولا يكون داخل فيه والركن هو جز الماهية“

¹⁸Al-Ābi: *Jawāhar al-Aklīl*, Cairo, vol. ii, p. 317.

valid 'Will'.¹⁹ It was held of a document called a "Deed of Transfer" that merely by its being called a "Deed of Transfer" it shall not prevent its having the effect of a 'Will'. That is to say, it shall not effect its being held a 'Will' provided the essential ingredients of a 'Will' are present therein.²⁰

If a 'Will of a Muslim' is in writing it is not necessary that the same be signed by him.²¹ The reason is that a Will made by a Muslim need not necessarily be in writing. Indeed, the proving of an oral Will is a difficult problem. It has to be proved with great caution together with all its surrounding circumstances and facts.

Form of Will—No specific form prescribed, oral Will valid under Muslim Law, intention of testator clearly stated must be acted upon : A Muslim is not obliged to observe any special formality in making his "Will", the Muhammadan Law not having prescribed any form in this regard. The 'Will' of a Muslim need not even be in writing; an oral 'Will' is perfectly valid; but the intention with respect to the property which the testator desires to be carried out after his death must, in whatever form they are declared, be with sufficient clarity, so as to be capable of being ascertained. If the 'Will' is in writing, it need not even be signed by the testator or attested by witnesses, because the verse in the Holy Qur'an regarding witnesses is considered merely as a recommendation, and is not mandatory. However, in majority of cases, 'Wills' are for obvious reasons, in writing. (PLD 1970 Kar. 450=Law Notes 1970 Kar. 322).

Modern Legislation :

It has been made clear in Syrian Law as well that 'Will' made verbally or in writing shall be effective. If the testator is unable to make a Will in either of the ways the same shall become effective even by signs that make his intention of making a Will evident.²²

The other ingredient of Will is acceptance. The Will, in all circumstances, becomes complete, perfect and effective by 'acceptance'. This has been discussed elaborately in the following Section.

¹⁹Mazhar Hussain vs. Budhabi, 1898, 21, Allahabad, 91.

²⁰Saeed Qasim vs. Ayesha Bibi, 7, Provincees of West and East 313; Eisher Singh vs. Baldev. 1884; 11 Indian Appeals, 135 and 141-43; 10, Calcutta, 792 and 800-802.

²¹Awliya Bibi vs. Ala-ud-Din, 1906, 28, Allahabad, 715.

²²*Qanūn al-Aḥwal al-Shakhsiyyah*, Syria, 1953, Section 208.

Section 224. (1) A Will shall be constituted by averment
Completion (proposal) and shall become complete and effective
of Will by acceptance.

(2) The legatee shall be considered to be the owner of the legacy when the Will has been, expressly or by implication, accepted on his behalf.

(3) Only that acceptance shall be given credence which is made after the death of the legator. No credence shall be given to the acceptance or refusal of the legatee made during the lifetime of the legator.

(4) So long as the acceptance or the refusal of a Will by the legatee after the legator's death, is not obtainable, the legacy shall not remain in suspense for a reasonable time, which shall depend on the court's discretion.

(5) If the legatee, after the death of the legator and before acceptance or refusal of the Will, dies, the heirs of the legatee shall be his representative and they shall have the right of accepting or refusing the 'Will'.

(6) After the acceptance of the Will taking possession of the legacy by the legatee shall be no condition for its validity.

Explanation : The condition of acceptance for the Will to be operative shall be essential in cases where the Legatee is defined and is capable of accepting the bequest.

COMMENTARY

Proposal and acceptance, as has been said in the foregoing Section, are the two ingredients of a 'Will'—proposal from the Legator's side and the acceptance from the Legatee. In other words it may be said, that the Legator's statement or averment is the 'Proposal' and the Legatee's admission by word or deed or the act is the 'Acceptance'.

Acceptance of Will : As 'acceptance' is essential in every contract, it is essential in a 'Will' as well, because the Will too is a contract. Therefore the Legatee shall not be entitled to the legacy (property under Will) unless

he has given his acceptance to it. One cannot, in a contract, constitute another owner of one's property without his agreeing to it. If the legatee is to be made owner of a legacy without his acceptance, there is, in certain circumstances, the risk of his incurring a liability. It is also possible that the legatee may not like to put himself under obligation to the legator.

It is not a condition for acceptance that it must be expressly made. It may as well be implied. An "express acceptance" may be in a form wherein the legatee uses such words that express his consent clearly. For instance, he may say, "I accept the Will made by certain person"; or he may say, "I consent to the Will made by certain person." The "implied" acceptance may be inferred from the acts of the legatee that indicate his consent. For instance, taking possession of the legacy by the legatee after the death of the legator and his maintaining possession over the same thereafter.

Death of legatee—an implied consent : As the 'contract of Will' has basically a distinctive feature compared to other contracts in as much as the contract of 'settlement of property' is established therein after the death of the legator and not in his lifetime, hence its acceptance made after legator's death shall only be valid. That is why it shall be correct to reject the acceptance made in the lifetime of the legator; because the proper time for a valid acceptance of a Will begins just after the death of the legator. Acceptance by the legatee any time prior to it is not relevant. Same is the case with its refusal. If it is refused in the lifetime of the legator but is accepted after his death, such acceptance shall stand good and the legatee shall be considered to be the owner of the legacy though he may or may not have taken possession of the same; because in 'Will' as against 'Gift', making over possession is no condition. If the legatee, in the lifetime of the legator, accepts the Will but repudiates it after the legator's death, the legacy shall be considered to be the property of the heirs of the deceased legator. But if the legatee (in a similar case) neither accepts nor refuses the Will, the ownership of the legacy, in such an event, shall remain suspended. That is to say, the legacy shall not belong either to the heirs or to the legatee as long as the Will is not accepted or refused. If the legatee after the death of the legator also dies before accepting or refusing the Will, then, according to the Ḥanafis, the legacy shall automatically go to the heirs of the legatee. This rule is based on *Istiḥsān*. Their argument runs thus: a 'Will' is completed by the death of the legator and there remains no possibility of its revocation after his death. Similarly no possibility of its being repudiated exists after the death of the legatee. Hence, the Will shall be deemed to stand and exist

in favour of the legatee and the legacy shall, thus, devolve upon heirs of the legatee. In other words, according to Ḥanafis, if the legatee's death occurs *before* his rejection of the Will, his death shall be considered to be his implied acceptance and he shall be considered to be the owner of the legacy, the same shall then devolve upon his heirs as his property.²³

Imam Zufar's View : Here a question may arise. If acceptance is a condition and it has not been fulfilled positively how, then, can the contract of 'Will' be said to be completed? The fact is that the death of the legatee has been taken here to mean his acceptance and thus the condition of 'acceptance' is held to be fulfilled. This, however, is the general practice among the Ḥanafis. But according to Imam Zufar a 'Will' takes effect merely by proposal and acceptance is not its ingredient. Zufar, applying the principle of inheritance on the 'Will', holds the property of the legatee to be a heritage. As in inheritance, acceptance is no condition and the heir, whether he accepts or not, becomes its owner, in the same manner, the legatee, too, according to Zufar, becomes owner of the legacy.²⁴

The view of Zufar, according to this writer, does not appear to be correct. A 'Will' in fact creates a new ownership; not that it passes ownership as inheritance i.e. in succession. The legatee in 'Will' is legally entitled to reject the Will, in as much as it is 'an act of favour' on behalf of the legator. Whereas the heir, in inheritance, is not legally entitled to reject the same; because it is a settlement of property by God in favour of His creatures. Hence, the application by analogy of a rule of inheritance on the Wills by Zufar is highly illogical.

Difference between Will and Inheritance: There is a basic difference in the nature of transfer of property between a 'Will' and 'Inheritance'. Transfer of one's property through 'Will' is a voluntary act of a man, whereas it is automatic in 'Inheritance'. That is to say, a person makes another person a proprietor through Will at his own decretion and the right of its acceptance or refusal belongs to the legatee. The legacy does not become the property of another (legatee) unless he has accepted the Will. As against this, in 'Inheritance' the property automatically, according to law, devolves upon the

²³Zaid al-Abyāni: *Sharah al-Aḥkam al-Shari'ah*, Cairo, *Kitāb al-Wasiyyat*, vol. ii, p. 289; Al-Kāsani: *Bada'i' al-Ṣana'i'*, Cairo, vol. vii, p. 331.

²⁴Ibid, p. 331.

”الوصية ولو الايجاب من الموصى فقط“

heir without the volition on the part of the heir or of the person from whom the inheritance is received. If an heir, let it be supposed, gives up his share, this act of his shall be the relinquishment of his own property, not the rejection of the devolution of the property. If any portion of the inheritance, being in possession of some other heir gets wasted because of his gross negligence, that other heir (in possession) shall be liable to pay damages because the interest of the first mentioned heir had been created in the inheritance with the death of the ancestor.

Hanafi View : Hence, acceptance of Will by the legatee, according to the majority of Hanafi jurists, is one of the ingredients of a 'Will' except when acceptance of the Will by the legatee becomes impossible and its rejection by him as well is not on record. In such a case, the legatee or his heirs shall become owners of the legacy by mere proposal of the Legator. This also, according to Hanafi jurists, is a constructive or implied proof of acceptance. For instance, the legator dies and the legatee too, without accepting the legacy. The legacy shall then pass to the heirs of the legatee. As long as the legatee is alive (during the lifetime of the legator) there is positively the likelihood of the 'Will' being rejected (or accepted). But the occurrence of his death without his rejection makes his rejection impossible. Hence, according to them, the legacy, without acceptance, shall pass to the legatee and belong to his heirs. Therefore, the legatee's express or constructive acceptance is a condition. In the above stated instance the death of the legatee prior to his acceptance or rejection has been held to be a constructive acceptance of 'Will' on the basis of *istihsān*. As a result thereof his (the legatee's) heirs shall be entitled to get the legacy under that Will.²⁵

Analysis of the Hanafi rule : Obviously an objection may be raised here. If acceptance of the legatee becomes impossible the stipulation regarding acceptance remains unfulfilled. How death which ends life can then be construed to be constructive acceptance? Had the legatee been alive there was as much the possibility of its rejection by him as its acceptance. This objection, in fact, is based on *Qiyās*, whereas the basis of this rule is *istahsān* (more subtle analogy). The sanction which *istahsān* provides may be, not being onerous, quite opposed to analogy simpliciter without any consideration or labour, in the property of another, yields to a strong presumption for acceptance as against rejection, and it is this what the rule of *istihsān* really implies. Hanafi jurists, on this basis, have held death,

²⁵Ibid, p. 331.

because of legatee's silence, to be his constructive acceptance. This argument of Hanafi jurists is based on such subtle logic which is a bit difficult to follow.

Acceptance of a 'Will', both by word or deed, is valid. Acceptance by 'words' is, of course, in cases where the legatee accepts the will expressly by 'words' and acceptance by 'deeds' is implied in cases where he himself makes a 'Will' of the legacy in favour of another or gives it away in gift to someone or obtains a loan by mortgaging the legacy or appropriates the legacy to some other use of the like nature. The time for accepting or rejecting the Will begins with the death of the legator. No reliance shall be placed on acceptance or rejection of the Will prior to the death of the legator. Even if the legatee rejects the Will in the lifetime of the legator but accepts it after his death the acceptance shall be valid, because the proposal of a Will, legally takes effect only after one's death. Consequently, acceptance, too, made after the legator's death shall be relied upon.²⁶

Acceptance and proposal to be in accord: Acceptance should, however, be in accord with the proposal. If it be at variance with the proposal, it shall not be valid, because a contract gets constituted where a proposal and its acceptance are in accord and no privity is established in a state of variance.²⁷

Maliki Rule of Conduct :

With the Malikis too like the Hanafis the use of the word "Will" is no pre-condition for making such an offer. The 'Will' shall be validly inferred from each of the words that conveys the sense of Will. A 'Will' made by signs as well shall be valid. Acceptance by the legatee, according to them, too, is a necessary condition. In the event of the legatee being definite the 'Will' shall not be valid without his acceptance. In the event of the legatee being indefinite, e.g. for 'paupers', acceptance shall not be a condition.²⁸

²⁶Ibid, p. 332, Kamila Tayyibji: *Limited interests in Muhammadan Law*, London, 1949, p. 87.

^{26a}Ibid, p. 333; Al-Sarakhsi: *Al-Mabsūt*, Cairo, vol. xxviii, p. 148.

²⁷Al-Kasānī: *Bada'i' al-Sana'i'*, Cairo, vol. vii, p. 334.

²⁸Al-Ābi: *Jawāhar al-Aklīl Sharh Mukhtaṣar al-Khalīl*, Cairo, vol. ii, p. 317;

"(وقبول) موصى له (المعين شرطاً) في وجوب تنفيذها - وما غير المعين فلا يشترط قبوله"

Ibn Rushd's averment : Ibn Rushd in his work, "*Bidayat al-Mujtahid*" has stated that the acceptance of a legatee, according to Imam Mālik, is absolutely essential for the validity of a 'Will'. No distinction has been made in respect of acceptance between a definite or an indefinite legatee.²⁹ But Imam Malik's well considered opinion is the one reported by Al-Ābi in his noted work, "*Jawāhar al-Aklil, Sharh Mukhtaṣar al-Khalil*" as mentioned above, and this assertion is worthy of credence. According to Hanafis themselves as well the condition of acceptance is applicable only where the legatee is definite and is capable of accepting. When the 'Will', as against this, is made in favour of beggars or paupers, in general terms, 'acceptance' by them shall not be a condition.

Time of acceptance : Imam Malik too agrees on the question of the time of acceptance of Will, with other Imāms to the effect that the acceptance of 'Will' by the legatee only after the death of the legator shall be relied upon. But if the legatee, after the death of the legator, dies before the acceptance, the heirs of the legatee, according to Maliki jurists, shall be his representatives and they shall have the right of accepting or rejecting the 'Will'.³⁰

Shafi'i's Rule of Conduct :

According to Shafi'i's practice, too, the 'proposal' and 'acceptance' are the two ingredients of a valid 'Will'. What a legator expresses is called a 'proposal' and what the legatee expresses is his 'acceptance'. According to him as well a 'Will' without acceptance is incomplete. That is to say the legatee shall not become the owner of the legacy without accepting the Will.³¹ According to Shafi'is as well acceptance after death of the legator is considered as valid. Acceptance or rejection in the lifetime of the legator

²⁹Ibn Rushd: *Bidayat al-Mujtahid*, Cairo, vol. ii, p. 336.

³⁰Al-Ābi: *Jawahar al-Aklil*, Cairo, vol. ii, p. 317 :

”وقبول المعين شرط بعد الموت فالملك له بالموت“

Imam Ṣaḥnūn: *Al-Mudwanatul-Kubra*, vol. xv, p. 351 :

”قال مالك ورثة الموصى له مكانه والوصية لهم (قلت) هل لهم ان يردوها ولا يقبلوها (قال) نعم ذلك لهم“

Ibn Rushd: *Bidayat al-Mujtahid*, vol. ii, p. 336.

³¹Al-Shirazi: *Al-Muḥadḍḥab*, Cairo, vol. i, pp. 457, 459, 471; Imam Shafi'i: *Kitāb al-Umm*, Cairo, vol. iv, p. 97.

shall not be relied upon. Hence, if the legatee dies in the lifetime of the legator the Will shall be void. If, however, the legatee, prior to acceptance and after the death of the legator, dies, in such an event, his heirs shall act as his representatives in accepting or rejecting the 'Will', because this amounts to an option regarding property which is according to the Shafi'is a heritable right. This according to them is at par with the right of pre-emption which they also hold a heritable right.³² If the legatee is indefinite such as beggar etc. the 'Will' shall, just after the death of the legator, become effective ; because acceptance by the legatee, in such a case, due to his being indefinite, is inconceivable. Hence acceptance in such a case is not necessary.

Hanbali Rule of Conduct :

According to Hanbalis also, acceptance after the proposal is a condition for the validity of a 'Will', whether the legatee is one person or a group of persons. Like other Imams, Imam Ahmad b. Hanbal also holds that acceptance or rejection in the lifetime of the legator shall not be valid.³⁴ Acceptance may be effected both by word or deed and so also rejection of a Will.³⁵

Death of legatee, Effect of : If the legatee, without acceptance of the Will, dies in the lifetime of the legator, the Will shall become void ; or if the legatee, after the death of the legator, rejects the Will it shall become void. However, if the legatee, after the death of the legator, dies before accepting or rejecting the 'Will', the right of accepting or rejecting the Will shall devolve on the heirs of the legatee.³⁶

Indefiniteness as to legatees : If the legatees are indefinite as 'Ulamā', or 'beggars' or 'paupers', in such an event the acceptance of Will on behalf

³²Al-Shirāzi: *Al-Muḥadḍab*, vol. i, p. 460 :

”وان مات الموصى له، قبل موت موصى بطات الوصية، ولا يقوم وارثه مقامه . وان مات بعد موته وقبل القبول قام وارثه مقامه في القبول والرد لأنه خيار ثابت في تملك المال فقام الوارث مقامه كخيار الشفعة“

³³Ibid, p. 459.

³⁴Al-Maqdisi: *Al-Iqna'*, Cairo, vol. iii, p. 51 :

”ولا يثبت الملك للموصى له الا بقبوله بعد الموت“

³⁵Ibid.

³⁶Ibid, p. 52; *Al-Mukhtaṣar al-Kharqī*, Cairo, p. 111.

of the legatees is inconceivable and acceptance shall not be an essential condition. Same shall be the case with the Will made conducive to public good.³⁷

Shi'i Practice :

Like the four *Sunni* schools of fiqh, according to *Shi'ah* rule of conduct too the proposal and acceptance are the two ingredients of a Will, and each of the words that indicates the said intention is called 'proposal'. For instance, the saying, "After my death give away so much to so and so, or after my death this thing shall belong to such person, or I make a Will in favour of such a person".³⁸

Acceptance by legatee during legator's life : The proprietary right of the property under the Will, after the death of the legator, devolves on the legatee provided he has accepted it.³⁹ If he has not accepted it the proprietary right shall not get transferred to him merely because of the death of the legator. If the legatee had accepted it before the death of the legator, the acceptance, according to *Shi'ah* rule shall be valid, but acceptance after the death of the legator shall be considered to be more credible.

According to the present writer, *Shi'ah* viewpoint as to the acceptance by the legatee prior to the death of the legator is not correct, because the proposal of Will is itself effective after the death of the legator. Hence, the proposal till the death of the legator can not form the subject of a valid acceptance in as much as the legator during his lifetime, whenever he so wishes, may revoke the Will. The acceptance during the legator's lifetime, therefore, shall become meaningless. This is further supported by their own view in that they do not hold the rejection of Will in the lifetime of the legator to be credible. Hence, according to them, if the legatee rejects the Will prior to the death of the legator and thereafter on the death of the legator accepts the Will, the acceptance shall be valid because, according to *Shi'ah* jurists as well, the rejection by the legatee in the lifetime of the legator is of no consequence.

³⁷Al-Maqdisi: *Al-Iqna'*, Cairo, vol. iii, p. 51.

³⁸Al-Hilli: *Shari'i' al-Islam*, Beirut, p. 258 :

"ويفتقر الى ايجاب وقبول"

³⁹Ibid :

"وينتقل بها الملك الى الموصى له بموت الموصى وقبول الموصى له"

If after the death of the legator, the legatee at first accepts but before taking possession rejects the Will there are, on this question, two opinions of Shi'ah jurists :—

1. The Will shall be void.
2. The Will shall not be void.

The second view, according to Shi'ah 'Ulama themselves, is more sound. If, after the death of the legator, the legatee accepts as well as takes possession of the legacy the unanimous verdict is that the Will shall not then be void by subsequent rejection,⁴⁰ because, by acceptance coupled with possession, the Will stands executed. There remains no occasion for rejection; hence no credence shall be given to it. The legacy, ordinarily after the acceptance, is considered to get included in the properties of the legatee, because transfer of actual possession in a Will, as against the gift, is not a necessary condition.

Conclusion :

The question is: what shall be the effect on Will of the death of the legatee without his rejecting or accepting the Will ? According to Hanafis, in such an event, constructive acceptance shall be presumed and the legacy shall be considered as heritage of the legatee which shall be divisible among his heirs. As against this, the Malikis, Shafi'is and Hanbalis hold that the right of rejecting or accepting the Will, on the death of the legatee, shall devolve on his heirs who may either reject or accept the same. If the heirs accept the Will, it shall become operative otherwise it shall become void. No concept of 'constructive acceptance' is to be found in Shi'ah rule of conduct in this respect. Ibn Hazm Zāhiri too is silent on this point.

The basis of difference between the Hanafis and the three schools of *fiqh* is the principle of option (*khiyār*) namely, whether the right of option is heritable or not ? According to the Hanafis, the right of option exercisable on inspection or in a conditional contract are not heritable rights. Rather, only the purchased property, as the estate of the deceased, becomes heritable by his heirs. On the basis of this principle they have, applying the right of option of acceptance or rejection of Will as an option of right or option of condition and so not heritable, made the Will itself, which is generally beneficial to the interest of the legatee, operative in favour of the legatee, on account of his death and incapacity of acceptance

⁴⁰Ibid.

or rejection. As against this, the optional rights, according to each of the three schools of *fiqh*, are themselves heritable. Hence, according to them the optional right gets transferred to the heirs of the legatee on his death and he is in a position to reject it too.

The contention of the Hanafi jurists is based on the doctrine of *istihsān* whereas the said three schools, in view of 'acceptance being a condition in Will' have on pure logic made the option heritable.

According to this writer the rule of conduct of the three Imams appears to be more reasonable. Hence, agreeing with the rule of conduct of Malkiyyah, Shafi'yyah and Hanbaliyyah the transfer of the right of option of accepting or rejecting the Will to the heirs of the legatee appears to be rational. And it is on this basis that the law on this question has been framed in this Code.

Modern Legislation :

Egypt :

Under the Egyptian law, "Qanūn al-Wasiyyah" No. 71 of 1946 following are the provisions of law regarding the acceptance and rejection of Will :

Section 20 : After the death of the legator acceptance of Will by the legatee either expressly or constructively shall make the Will absolute. Hence, if the legatee is a child in womb or is unable to accept or is prevented from utilising the property, in such circumstances, the acceptance or rejection of the Will by the man who is guardian of his property shall be given credence, provided permission of the same has been granted by a Court having jurisdiction in the matter.

Section 21 : When the legatee dies before accepting or rejecting the Will his heirs shall be considered to be his legal representatives in the matter of accepting or rejecting the Will.

Section 22 : It shall not be a condition, for acceptance or rejection of the Will that it be acted upon just after the death of the legator. However, the Will shall become void when the legatee, or his heirs, or those who have the right of accepting or rejecting the Will, receive information, or get the written intimation demanding acceptance or rejection of the Will, and thereafter in spite of such knowledge and intimation do not intimate their acceptance or rejection within thirty days of the same without any legal justification for the delay.

Section 23 : When the legatee accepts some portion and does not accept the other portion of the Will, the portion of the Will he accepts shall be enforceable and the rest of the portion of the Will shall be void. When out of several legatees some accept and the others reject the Will, it shall be enforceable in respect of legatees who accept the Will and it shall be void in respect of those who reject the Will.

Section 24 : A Will shall not become void by the rejection of its legatee before the death (in the lifetime) of the legator. Hence, if the legatee not having accepted the Will previously rejects the entire or a part of the Will after the death of the legator, the Will either whole or in part, as the case may be, shall be held to be void. When the legatee after the death of the legator rejects the Will after first accepting it, either wholly or in part and someone or anyone of the heirs of the legator accepts such rejection, the Will shall become void. If someone of the heirs of the legator does not accept the rejection of the legatee, the rejection shall be held to be void.

Section 25 : When the legatee is present at the time of death of the legator he shall, with the death of the legator, be held to be entitled to the legacy (from that very moment) except where some time after the legator's death is fixed in the Will itself for the same.

Tunisia :

Under the Tunisian law, "*Qanūn al-ahwal al-Shakhsiyyah*" of 1957 the Will shall stand abrogated by the rejection of the legatee himself or by that of his legal successors. After the death of the legator and the knowledge of the Will by the legatee its rejection within two months shall be acceptable. After the knowledge of the Will the silence of the legatee till the aforementioned time shall be the proof of its acceptance. If the legatee dies during that time his heirs shall become entitled to his share. If the legatee accepts a portion of the Will and rejects the other portion of it, the Will shall become effective with respect to the portion he accepts and shall be held to be void with respect to the portion he rejects.

If there are several legatees and from amongst them some accept the Will and others reject it, the Will shall become effective with respect to those legatees who accept it and shall become void with respect to those who reject it. Acceptance after rejection and rejection after acceptance (of the Will) shall not be valid except when the heirs agree to it.⁴¹

⁴¹ *Majallatul-Aḥwal al-Shakhsiyyah*, Tunis, sections 193-96.

Syria :

Under the Syrian Law, Will in favour of an indefinite legatee needs no acceptance, nor can it be abrogated on its rejection by someone. Will in favour of a definite person is abrogated by his rejection of it, if he is qualified to do so at the time of legator's death. However, the rejection of the Will should be within thirty days of the death of the legator or of its intimation to the legatee. When this period expires and the legatee in spite of its knowledge maintains silence or dies during that period without rejecting it, the same shall be equivalent to his acceptance (though he may have no intimation of the Will) and the property shall be considered to be that of the legatee.

In accordance with the Tunisian law in Syria as well, the rejection of a portion of Will and acceptance of another portion of the Will shall be given credence. Likewise, in the case of the legatees being more than one, acceptance by some and rejection by others, shall also be valid. But acceptance after rejection or rejection after acceptance of the Will shall not be valid except when the heirs agree to it.⁴²

Possession :

Legatee's possession over the legacy is no condition for the validity of Will. The case is otherwise in gift in as much as possession in a gift is an essential condition. Hence, if in a gift proposal and acceptance have taken place but the donor does not give up possession of the property donated, the donee can not obtain a decree from the Court for delivery of its possession to him. Whereas with the acceptance of the Will, after the death of the legator, the legatee becomes entitled to take possession of the legacy. He, may therefore, obtain possession of the legacy from the heirs through a court of law.

The four Sunni schools and the Shi'ah Imamiyah all are agreed on the point that after legator's death and legatee's acceptance of the Will his title to the legacy becomes absolute.⁴³

Section 225. In case of denial of a Will proof thereof shall be Proof necessary essential.

⁴²*Qanūn al-Aḥwāl al-Shakhsiyyah*, Syria, sections, 225-229.

⁴³Ibn Rushd: *Bidayat al-Mujtahid*, Cairo, vol. ii, p. 336; *Raḥmat al-Ummah* o.m.o., *al-Mizan al-Kubra*, Cairo, p. 19; Al-Shirazi: *Al-Muhadhab*, Cairo, vol. i, p. 459; *Jawāhar al-Aklīl*, Cairo, vol. ii, p. 317; Al-Hilli: *Shari'ī al-Islam*, Beirut, p. 258.

COMMENTARY

Evidence for the proof of Will is necessary as is ordained from the Qur'ānic verse "The evidence of two just witnesses from amongst you at the time of making Will."⁴⁴

Hanafiyyah :

There appears to be a consensus among the Hanafi jurists that "Will" shall be acceptable when it stands proved. The first thing for this is its proof by evidence.

A Will may be written or oral. If it is oral, it must be made in presence of two Muslim adult males or one male and two females. If it is written, it must be proved as a fact in accordance with the Islamic Law of Evidence. It is not necessary that the Will should be of a particular pattern or it should be authenticated in a particular manner.

If a person, through a document, transfers, in the name of another, right in a particular property by way of gift, but inserts a condition in the document that possession of the property shall pass after the death of the executant, the transfer shall not be by way of gift; it shall rather be considered to be a Will and it shall be on the ground that the possession has not been made over immediately, subject to all conditions governing a "Will".^{44a}

Malkiyyah :

According to Imam Mālik, if a written Will is available and two just persons bear witness to the fact that it is in the handwriting of the legator but the legator had not made those two persons witnesses to it, nor had he asked them to implement it, it shall not be enforceable. This is so because there is the possibility that though it had been written but there might be no firm determination about its enforcement or he might have retracted it. Similarly if the legator wrote the Will and read it over in presence of those witnesses but made them neither witnesses nor the executors thereof, it shall not be enforceable. But if he makes them witnesses or asks them to put it into force it shall then become enforceable as a Will. If after having written the Will the legator himself reads it over to the witnesses, or the witnesses themselves read it, and the legator tells them that it is his Will

⁴⁴Al-Qur'ān: *Surah Al-Mā'idah*, 5:106.

^{44a}Wilson: *Principles of Muhammadan Law*, chap. on "Wills".

and he has made them witnesses to it, or that they had not read it at all, but opening it they (the witnesses) learn that it is the Will to which they had been made witnesses, or in case of its being kept closed on instructions that it may not be opened before the death of the legator, it is opened after the death of the legator, the witnesses may bear witness to the fact of its being the Will. The Will shall then get proved by their evidence. It does not matter whether the Will might have come from the possession of the legator himself or from the possession of others.⁴⁵

Shafi'yyah :

According to the Shafi'is, the Will shall get proved by the evidence of two males or one male and two females. If a person claims that he has been appointed "executor", his claim should be proved by the evidence of only two males. Evidence of females alongwith the males shall not be acceptable in proof of a Will.⁴⁶ This rule is in accordance with the Shafi'i principle of evidence. But according to Hanafis the evidence of two females and a male shall prove the Will. No clear statement of Imam al-Shafi'i or of other Shafi'i jurists has been found in their books as to proof of a Will in writing. Indeed, the 'Will' of al-Shafi'i himself that has been recorded in the book, "Al-Umm" (Vol. iv, page 122) is a proof that the "writing of a Will" is also a means of its proof.

Hanbaliyyah :

If a Will, in a person's own handwriting, is found and his heirs admit that Will, or it is established by evidence that it is in his handwriting and it is not proved that he retracted it, it will be a ground of the validity of the Will. However, "Al-Muḥarrar" reports a statement laying down that 'Written Will' shall not be valid in spite of proof. This, the second report,

⁴⁵Al-Abi: *Jawahar al-Aklīl*, Cairo, vol. ii, p. 325; Imam Sahnūn: *Al-Mudwanatul-Kubra*, Cairo, vol. xv, p. 13.

⁴⁶Al-Shirazi: *Al-Muḥadḍab*, Cairo, vol. ii, p. 334 :
 "وبشيت المال وما يقصد به كالبيع والاجارة والهبة والوصية والرهن والضمان
 بشاهد وامراتين... الخ وما ليس بمال ولا المقصود منه المال ويطلع عليه الرجال كالنكاح
 والرجعة والطلاق والعناق والوكالة والوصية اليه وقبل العمد والحدود سوى حد الزنا
 لا يثبت الا بشاهدين ذكرين الخ"

⁴⁷Al-Maqdisi: *Al-Iqna'* Cairo, vol. iii, p. 47; Majd-ud-Din Abul Barakat:
Al-Mḥarrar fil fiqh, Cairo, vol. i, p. 376.

is also from Imam Ahmad b. Hanbal.⁴⁷ But it does not appear to be sound, for its veracity has been doubted by Ibn Qudamah in *Al-Mughni*.^{47a}

If a written Will, however, is found with attestation of witnesses but it could not be ascertained that it was in the handwriting of the legator, it will not be accepted as his Will. But if it is proved by external evidence that it is in the handwriting of the legator, it shall be acceptable and acted upon, not because of the attestation therein, but due to the proof of the legator's handwriting.⁴⁸

The Shi'i :

The evidence of two just Muslims shall be sufficient to prove a Will. According to Shi'ah jurists, however, in the event of Muslim witnesses not being available when needed the evidence of non-Muslims particularly those from a Muslim territory (Dar al-Islam) shall be valid.⁴⁹

In a Will regarding property, evidence of one person alongwith the oath of the claimant, or of one male and two females, shall be acceptable. Evidence of females alone shall not be acceptable in the claims for property. As to the proposition whether secondary evidence to prove the evidence of the principal witnesses (شهادة على الشاهدين) alongwith the oath of the claimant, shall be acceptable or not, there are two reported opinions. The correct view is that it shall not be acceptable.⁵⁰

Evidence of the executor in a matter relating to his appointment as executor shall not be acceptable because his own evidence promotes his own interest by conferring an office on himself.

Modern Legislation :

Egyptian Law: In Egyptian Law great stress has been laid on the Will to be in writing. It is thus said in Section 65 :

^{47a}Ibn Qudamah Al-Maqdisi: *Al-Muqni'*, Salfiyah, Medina, vol. ii, p. 356.

⁴⁸Sharaf ud-Din Al-Maqdisi: *Al-Iqna'*, Cairo, vol. iii, p. 47.

⁴⁹Al-Hilli: *Sharā'i' al-Islām*, Beirut, p. 262 :

”ويثبت الوصية بشاهدين مسلمين عدلين ومع الضرورة وعند عدم المسلمين يقبل شهادة اهل الذمة خاصة“

⁵⁰Ibid:

”و يقبل في الوصية بالمال شهادة واحد مع اليمين او شاهد وامرأتين الخ“

Section 65 : Any Will without being written in the handwriting of the legator or without his seal or his thumb being impressed thereon shall not be valid. Hence, if the legacy pertains to land or is of movables worth more than five hundred red *dinārs*, the Will must be drawn up by a just and expert scribe.

Tunisian Law :

The Tunisian "*Mujallah al-Ahwāl al-Shakhsiyyah*" makes it clear that the proof of making a Will and its revocation, if any, both could (only) be effected by an authentic deed as shall be evident from the Sections noted below :

Section 176. The Will shall stand proved by an authentic deed written by the legator which bears a date and has not been revoked.

Section 177. Legator's revocation of the Will shall be valid subject to the provisions of Section 176 above.⁵³

Indo-Pakistan Rulings :

Nature of evidence : The Dacca High Court has held in a case (P.L.D. 1961 Dacca 360), "When a Will is sought to be propounded the onus of proof in every case lies on the person seeking to prove the Will to satisfy the conscience of the Court that the instrument so propounded in the Court is the last Will of the testator. It must not be forgotten that the law is laid down in clear and imperative terms by Acts of the Legislature and it is by the provisions of those Acts that a Court must be guided. There is no rule of law as to the particular kind or description of evidence by which the Court must be satisfied as to the truth of a case. The degree of suspicion and the weight of burden imposed on the person propounding the Will must depend on the nature or circumstances of each case."

The same High Court in an earlier case (P.L. D. 1957 Dacca 513) held, "Those who take benefit under a Will and have been instrumental in preparing or obtaining it have the onus thrown upon them of showing the righteousness of the transaction. This rule of law extends to all cases of Will in which circumstances exist which excite the suspicion of the Court. Where such circumstances exist and whatever their nature may be, it is for those

⁵¹Ibid:

"ولا تقبل شهادة الوصى فيما وصى فيه ولا ما يجربه نفعاً او يستفيد منه ولاية"

⁵²*Qanūn al-Wasiyyat*, Egypt, 1946, sections 65-66.

⁵³*Majallat al-Ahwāl al-Shakhsiyyah*, Tunis, sections 176-177.

who propound the Will to prove affirmatively that the testator knew and approved of the contents of the document, and it is only when this is done the burden of proof is thrown on those who are opposing the Will to prove fraud and undue influence.

Where executors propounding a Will take a large and appreciable benefit thereunder, the Court treats the Will of more or less weight according to the facts of each case, and the onus lies on such an executor to prove to the satisfaction of the Court that the testator understood what he did, and that it was his will."

The Supreme Court of Pakistan as well has, on this question, held in a case reported in PLD 1958 at page 209, "While the party propounding the Will has to establish that it was executed in a sound disposing state of mind, the burden of proving that the will resulted from coercion and undue influence is on the party who alleges it."

Regular writing not essential : A letter that the deceased had written a little before his death, contained some instructions regarding the transfer of his property, was held to be a valid Will.^{53a} It is not essential for a written Will to be signed,^{53b} or to be attested.^{53c}

Oral will : The burden of proof of an oral Will is always very heavy. It has to be precisely stated with a high degree of accuracy as regards its time and place.^{53d} A court shall put such a Will into force only when it is quite evident from the circumstances and statements of the witnesses as to the actual words uttered by the legator and that the Court is able to conclude from the circumstances and evidence the real intent of the deceased to the fact that it should be regarded as his last Will. Besides, the court must also be completely satisfied with the contents of the instructions of the legator.^{53e}

^{53a}21, Allahabad 91; AIR 1940, Madras, 153; 187, Indian Cases, 414.

^{53b}28, Allahabad, 715.

^{53c}7, Bombay Law Report, 558; 43, Bombay 641; 49, Indian Cases 637; AIR 1952, Mudhia Pardesh, (Bharat), 56.

^{53d}AIR 1931, Privy Council, 281; 68, Indian Cases, 254; 44, Allahabad, 301.

^{53e}AIR 1937, Privy Council, 174; 168, Indian Cases, 418; 41, Calcutta, Weekly Notes, 933; AIR 1939, Allahabad, 348.

Suggestion :

In view of the present day conditions it shall be advisable to suggest that in Pakistan as well the Will regarding immovable property be included by law in the list of compulsorily registerable documents, except when by evidence it is proved that the legator had no opportunity of writing out or registering the document or that it was not reasonably possible for him to do so.

Section 226. A Will whether absolute or conditional or contingent shall be valid.

Absolute, conditional and contingent Will

COMMENTARY

Absolute Will means a Will which as regards time or grant is absolute. No limitation or restriction is attached to it. Hence, a Will may be absolute and independent of time; and may also be restricted to a fixed time which is called "*Wasiyyat al Muwaqqatah*". Generally, these two forms are adopted in a Will of the usufruct. As the Will of the usufruct amounts to '*lending*' and '*lending*' may be of two kinds : 'absolute' and 'restricted to a fixed time'. Hence, Wills as well, 'absolute' and 'restricted to a fixed time', have been held to be valid. There is a consensus of the Four Imams on it.

Will of usufructs restricted to time :

If the legacy is regarding usufructs only and the Will is absolute the legatee shall derive the benefit till his life. After the death of the legatee the legacy shall belong to the heirs of the legator. If the Will is restricted to a fixed time, it shall get transferred to the heirs of the legator after the expiry of the time stipulated therein, as far the Will in respect of the fruits of the trees and the income from the rent is concerned. If the trees bear fruits and the rents of the houses become due in the lifetime of the legatee and he, in the meanwhile, dies, the fruits of the trees and the income from the houses shall belong to the heirs of the legatee, in as much as these usufructs had accrued in the lifetime of the legatee and the legatee was the owner thereof which he left behind him as heritage to his heirs. So now as a matter of right these usufructs belong to his heirs.⁵⁵

⁵⁴ Al-Kasani: *Bada'i' al-Sana'i*, Cairo, vol. vii, p. 352.

⁵⁵ Ibid, p. 353.

Contingent Will :

Will may be made dependent on some condition. In such an event, the condition must be valid, otherwise the condition shall be void and the Will shall be effective.^{55a}

Maliki View :

According to Imām Mālik as well making a Will dependent on some condition is valid. For instance, a person makes a Will that if his wife does not enter into another marriage contract after his death certain property belonging to him shall be given to her. If his widow contracts another marriage the Will shall be void; if she does not it shall be valid. Similarly if after the death of the legator, the legatee fulfils the condition and the Will on this ground is put into effect, but the legatee after taking possession of the legacy, violates the condition laid down by the legator, the property given under the Will shall be taken back from the legatee.⁵⁶

Shafi'i View :

Making a Will in one's own life contingent on a condition shall be valid. As the Will of an unascertainable thing is valid its being contingent on some condition shall, all the more, be so. It shall be valid, if it is made contingent on some condition, after one's death. A will contingent upon a condition 'after death' is at par with one contingent upon a condition 'in life'. Therefore, if making the Will dependent on a condition in life is valid it shall also be valid to make it dependent on some condition after death.⁵⁷

Hanbali View :

According to Hanbali jurists as well both the Wills, absolute and restricted, are valid. The absolute Will is made without any restriction or condition. The conditional Will is the one where the legator says, for example, that if he dies from the illness, or goes on travel and does not come back, one-third (1/3) of his property be given to the pauper. A conditional Will shall become void on the failure of its condition. That is to say, if the legator recovers from the illness or returns hale and hearty from the journey and thereafter dies the said Will shall become void and shall not be

^{55a}Ibid.

⁵⁶Al-Saḥnūn: *Madūnat al-Kubra*, Cairo, vol. xv, p. 24.

⁵⁷Al-Shafi'i: *Kitab al-Umm*, Cairo, vol. iv, p. 112; Al-Firozabadi: *Al-Muhadhab*, Cairo, vol. i, p. 459.

enforceable. But if he dies of that illness or during that journey the Will shall be enforceable.⁵⁸

To make the Will contingent on a condition is, thus, valid. The Will shall be enforceable when the condition is fulfilled and it shall be void when it does not.⁵⁹

This is based on the juristic rule: "When the condition fails the conditioned also fails".^{59a}

Tunisian Law :

The relevant provision of Section 172 under Tunisian Law of "Al-Wasiyyat" says: "When the Will is contingent on some invalid condition, the condition shall be void and the Will shall be deemed to be valid".^{59b}

Section 227. Making a Will is desirable according to Shari'ah.

Will, Whether
desirable or
incumbent ?

COMMENTARY

The question whether the making of a Will is desirable or incumbent has assumed some importance these days. Particularly in Egypt a Will has been classified into two categories: the incumbent and the desirable. Regarding the "Incumbent Will" the law assumes that the Will has been made, though, in fact it may not have been made. Hence, in the following lines the discussion has been divided into two parts: the first discussion deals with sanction of the Will and the other with the rules governing a Will. In the end, the current law of Egypt concerning 'incumbent Will' (*Wasiyyatul Wājibah*) has been elaborately discussed.

Sanction of Will :

Making of a Will is sanctioned both by the Qur'ān and the traditions of the Holy Prophet. The relevant verses in the Qur'ān are as follows :

Qur'anic Verses : (i) But if ye leave a child they (the wives) get an eighth after payment of legacies and debts." (IV : 12).

⁵⁸ Abu al-Barakat: *Al-Muharrar fil fiqh*, Cairo, vol. i, p. 376.

⁵⁹ Sharf ud-Din Al-Maqdisi: *Al-Iqna'*, Cairo, vol. iii, pp. 55, 57.

^{59a} "إذا فأت الشرط فأت المشروط"

^{59b} *Qanūn al-Aḥwāl al-Shakhsiyyah*, Tunis.

(ii) “The mother has a sixth after the payment of legacies and debts”. (IV : 11).

(iii) But if they (the wives) leave a child, ye get a fourth ; after the payment of legacies and debts”. (IV : 12).

(iv) “But if more, then they (*akhyāfi* sister and brothers) share in a third after payment of legacies and debts”. (IV : 12).

(v) But if anyone fears partiality or wrong doing on the part of the testator and makes peace between them there is no wrong in him”. (II : 182).

(vi) “It is prescribed, when death approaches anyone of you, if he leave any goods, that he make bequest to parents and next of kin, according to reasonable usage. This is due from the God-fearing”. (II : 180)

(vii) O’ ye who believe ! When death approaches any of you, (take) witnesses among yourself when making bequests, two just men of your own (brotherhood), or others from outside if ye are journeying through the earth and the chance of death befalls you (thus). (V : 109).

Prophet’s traditions: Such sanction is also found in the traditions of the Prophet and his Companions. Consequently, the following traditions are reproduced from *Saḥīḥ al-Bukhārī*, *Sunan Abū Dā’ud* and *Ibn Mājah* :—

(i) It is narrated from ‘Abdullah Ibn ‘Umar that the Prophet said : “A Muslim who has some thing has no right to pass even two nights without making a Will unless he has already written one”,⁶⁰

(ii) Sa’d Ibn Abī Waqqās said “the Prophet of God came to visit me in my sickness. I was then at Mecca and did not like to die at a place from where I had migrated”. The Prophet of God said : “God shall have mercy on Ibn ‘Afrā’. I said to the Prophet, O’ Prophet ! I am wealthy and my only heir is my daughter. Permit me that I make a Will of my entire property”. He said : “No.” I said, should I make a Will of two-third of my property?” He said, “No.” Hazrat Sa’d then said, “permit me for a third.” The Prophet replied, you may, however, make a Will of a third, although this is also too much. To leave after you your

⁶⁰*Saḥīḥ al-Bukhārī*, Karachi, vol. i, pp. 383-84; *Sunan Abu Dā’ud*, Karachi, vol. ii, p. 395.

heirs well to do is better than you leave them pauper and in want and others meet their needs.⁶¹

- (iii) Jābir b. ‘Abdullah narrates that the Prophet *Sallallahu ‘alayhi wa sallam* said, “Whoever died after making a Will, died on straight path following the (Prophet’s) tradition. The one who died on piety or achieved martyrdom receives absolution.⁶²
- (iv) Mu‘awiyah b. Qurrah narrates from his father that the Prophet (Sallallahu ‘alayhi wa sallam) said, “The one whose death approaches him if he makes a Will and his Will is in accordance with the Book of God, it shall be the atonement for the non-payment of Zakat due from him in his lifetime.⁶³
- (v) It is narrated by ‘Atā’ from Abu Hurairah that the Prophet of God (Sallallahu ‘alayhi wa sallam) said, “Allah has conferred a blessing on you to do a good turn at the time of your death by means of a third of you property”.⁶⁴
- (vi) It is narrated from ‘Abdullah Ibn ‘Umar that the Prophet (Sallallahu ‘alayhi wa sallam) said, “O’ sons of Adam ! there are two things, none of them were (meant) for you. I have fixed for you a part of your own property at the time of your death so that I may purify you in consideration thereof and my slaves may pray for you after your death.⁶⁵

Demand of Presumption :

The presumption should be that a Will is not valid as the legator makes the legatee proprietor of the legacy at a time when his own ownership in the property has ceased. How can then, he, confer ownership ! In other words, death extinguishes his proprietary right and the direction for the utilization of his property is given by him for a time when his control of the property stands extinguished. Hence, after the extinguishment of his proprietary right its exercise or disposition by him by way of transfer in favour of others, is an absurdity. Thus, a Will should not be held valid. But the jurists explain the position by saying that a person, inspite of his actual

⁶¹Ibid.

⁶²*Sunan*, Ibn Majah, Karachi, p. 194.

⁶³Ibid.

⁶⁴Ibid.

⁶⁵Ibid.

death, shall be deemed to be legally alive for the purpose of some necessary or ancillary matters, for example, his burial, payment of his debts, realisation of debts owed to him by others etc. The execution of his Will is also included in such matters. It is on account of this fact that the Qur'ān directs the execution of Will and payment of debts prior to the operation of inheritance. This is a clear mandate (*naṣṣ*) for the lawfulness of the Will.

Another argument, which is put forth by the jurists as the rationale in support of the lawfulness of the Will, is that a man by nature proud and careless during his lifetime, is negligent and short-sighted in securing goodness through his wealth. When the death approaches him, his whole life comes before his mind's eye like a mirror. Thereupon he cries over his sins and shortcomings. Shari'at provides him, then, with the last chance of earning some thing good and of saving himself from torment in the other world ; so that he may, by his wealth, render that service which he might have neglected to do in his lifetime. This has also been hinted at in the above mentioned traditions of the Prophet (*Ṣallallahu 'alayhi wa sallam*).

On these grounds, the Four Imams, following the traditions aforementioned, hold the making of a Will to be a desirable act.⁶⁶

What is virtuous in Will ?

If the heirs of a legator are poor it is desirable that the Will be made of less than one-third because the Prophet (peace be upon him) has said, "One-third is also too much. It is better to leave your heirs behind you wealthy, than leaving them in want and they stretch their begging hands before others." Hence, the Prophet has considered "one-third" to be on the high side, thus leaving one's heirs in poverty is a loathsome affair. It, thus, follows that it is better to make a Will of even less than one-third of the property. Haḍrat 'Ali has said "It seems to me far better to make a Will of one-fifth compared to one-third of one's property." If the heirs, however, be in affluent circumstances, the Will of one-third of the property shall be preferable by interpretation as the Prophet has considered the Will

⁶⁶Al-Kāṣāni: *Bada'i' al-Sana'i'*, Cairo, vol. vii, p. 330; Al-Sarakhsi: *Al-Mabsūt*, Cairo, vol. xxvii, p. 142; Al-Saḥnūn: *Al-Madūnat al-Kubra*, Cairo, vol. xv, p. 33; Al-Shāfi'i: *Kitāb al-'Umm*, Cairo; vol. iv, p. 89; Sharf ud-Din al-Maqdisi: *Al-Iqnā'*, Cairo, vol. iii, p. 48.

”والوصية ببعض المال ليست واجبة بل مستحبة لمن ترك خيراً وهو المال الكثير“

of one-third of the property to be undesirable (*makruh*) when the heirs are destitute. It, therefore, follows that the Will of one-third of the property made in favour of a legatee when heirs are in affluent condition shall be quite appropriate. It is better that a Will being a virtuous act be made when one is enjoying sound health rather than it should be deferred. It is reported that Abu Hurairah said, "It was asked from the Prophet (*Sallallahu 'alayhi wa sallam*) when *sadaqah* was held more virtuous? He replied, "when you are enjoying sound health, you fear poverty and have the desire of becoming rich but instead at that time you make charitable offerings. Do not put off the matter for such a time when your soul comes to your throat and then you start saying so much to so and so, and so much to so and so..."⁶⁷

Making Will in favour of relatives who are not heirs is desirable. If all the relatives are well to do the Will should be made in favour of persons like paupers, 'ulemā etc.⁶⁸

Zahiriyyah's Rule :

Will, according to the Four Imams, is not mandatory; rather it is desirable. As against this unanimous view of the Four Imams, the Zāhiriyyah school of *fiqh* holds the making of Will as incumbent. Consequently, Ibn Hazm in his famous work, "*Al-Muhallā*" writes, "One who leaves behind property, it is his duty to make a Will. It stands proved by the tradition narrated by 'Abdullah Ibn 'Umar that the Prophet said, "No Muslim who has something (by nature of property) has the right of passing even two nights without making a Will. He must have his written Will with him." Ibn 'Umar said "Since I heard this from the Prophet, I have not passed a single night without having my Will with me."

Ibn Hazm has also narrated the aforesaid tradition on the testimony of 'Abdullah Ibn Mubārak. Also reporting from Hasan b. 'Ubaydullah, he has said that Ṭalḥa and Zubair also were very strict in this respect, (i.e. regarding the Will to be incumbent). Abdullah b. Abi 'Awf, Ṭalḥa b. Mutrif, Ṭa'ūs, and Sha'bi also say so. Ibn Hazm further argues that the same is the assertion of Abu Sulaiman and all our people"⁶⁹

The tradition of Ibn 'Umar relied upon by Ibn Hazm, has been explained that the word 'Will' used herein means that a Muslim has to make a Will

⁶⁷Al-Shafi'i: *Kitāb al-'Umm*, Cairo, vol. iv, p. 101; Al-Shirazi: *Al-Muhadhab*, Cairo, vol. i, pp. 456-57.

⁶⁸Sharf ud-Din Maqdisi: *Al-Iqna'*, Cairo, vol. iii, pp. 48, 59.

⁶⁹Ibn Hazm: *Al-Maḥilli*, Cairo, vol. vi, p. 381 :

about the debts and obligations due from him and the deposits and securities of others held by him, so that the debts of others, after his death, may be paid off without any delay. This meaning of the tradition has been so explained in *Tuhfatul Aḥwadhī, Sharh Jāmi' al-Tirmidhī*, Beirut, Vol. iii, p. 188. Imam Shafi'i too has stated this tradition in support of his view that to make 'Will' by a Muslim is desirable and not obligatory. (*Kitab al-Umm* Vol. iv. p. 89).

Ibn Hazm writes further that some Ulama maintain that a Will is not incumbent. They argue from Nāfi', based on a second tradition narrated by Ibn 'Umar through 'Ubaidullah b. 'Umar. In the said tradition, there is addition of the words, "If he has some property and he desires to make a Will thereof" to the text narrated through Ubaidullah b. Umar by Nāfi' from Abdullah Ibn Umar. Latter group maintains that in this tradition the Prophet has made the Will dependent on the intention of the Maker of Will, which is an argument in favour of the Will not being obligatory. It is a proof of its being dependent on one's volition. These persons also say that the Prophet did not make a Will and Ibn 'Umar, from whom the above mentioned tradition is narrated, himself made no Will and (similarly) Hatib Bin Abi Balta'ah also made no Will in the presence of 'Umar. It is narrated from Ibrahim Nakh'i that a Will is not obligatory, (Wājib). Same is the assertion of Mālik, Shāfi'i and Abū Hanifah.

Abu Muhammad Ibn Hazm rejecting their arguments has, however, argued in favour of his own view regarding Will to be obligatory. (For detailed arguments vide *al-Muhalla* by Ibn Ḥazm).

Mandate in absence of Will :

According to Ibn Hazm if a person dies without making a Will, it shall be essential to give away by way of Will, on his behalf, whatever property is possibly so due because discharging the obligation of making a Will is mandatory. When it is so, it is inescapable that the proprietary right of the deceased, after his death, in the obligatory part of his property be considered as lapsed. There is, however, no quantum fixed for such disposal. Its quantum shall rather be fixed at the option of the executor or the heirs. It should, however, be so fixed that the heirs are not placed under hardship.

69^aIbid.

”عن ابن عمر قال: قال رسول الله صلى الله عليه وسلم ما حق امرئ مسلم له شيء يوصي فيه يبيت ليلتين الا و وصية مكتوبة، عنده قال ابن عمر رضى الله عنه ما سرت على ليلة منذ سمعت رسول الله صلى الله عليه وسلم قال ذلك الا وعندي وصيتي“

69^bIbid.

Such was also the practice of the early jurists. There is a tradition stated from the Prophet also in this connection. Thus, as authenticated by Imam Malik, it is stated from 'Ā'isha that a person said to the Prophet, "My mother died all of a sudden. If she could talk at the time of her death she must have given instructions for making charitable donations or *Sadqa*. May I make them on her behalf". The Prophet replied, "Yes !" That person, therefore, made certain propitiatory offering on behalf of his mother. From this narrative it stands proved that such offerings are obligatory, and it is also proved that the one who has made no Will, propitiatory donations should be made on his behalf.⁷⁰

Degrees of Legatees :

Ibn Hazm, further writes, "It is the duty of every Muslim to make a Will in favour of non-heir relatives who, because of their being slaves, non-believers or being excluded from inheritance are held to be non-heirs. A Will may be made in favour of such persons according to one's own wishes. No quantum is fixed for the same. Even if a Will has not been made, it shall be obligatory to give something as if in the Will, to such relatives after consultation with the heir or executor. Consequently it shall be incumbent to make a 'Will' in favour of a person's parents or anyone of them, even they be a non-believers or slaves. If no Will has been made, yet something is to be given to them."⁷¹

Definition of Relatives :

According to Ibn Hazm the obligation shall be discharged only by making the 'Will' in favour of those relatives (*aqārib*), who are related to the deceased from his father's side, because in the dictionary meaning only such people are called *aqārib*. The inclusion of others as relatives shall not be correct logically. According to Ibn Hazm, his authority is the verse", "لوصية للوالدين والأقربين" Accordingly the parents and relatives who happen to be heirs shall be considered to have been excluded and making a Will in favour of such relatives who are not held to be heirs, shall be obligatory.⁷² Same are the conclusions of Ta'ūs, Hasan al-Baṣṣī, Sa'id b. Musayyib, Masrūq, Sālim b. Yasar, 'Ala' b. Ziyād, Abdul Malik b. Yu'la, Qatāda, Ayas Bin Mu'awiya, Ishaq and Abu Sulaiman.⁷³

⁷⁰Ibid, p. 382.

⁷¹Ibid, p. 384.

⁷²Ibid.

⁷³Ibid, p. 385.

Ibn Hazm further writes that, according to some persons, making a Will in favour of near relatives is not essential; it may even be made in favour of distant relatives. Other jurists like Zuhri, Salim b. Abdullah Bin 'Umar, Sulaiman b. Yasār, 'Amru b. Dinār, Muhammad b. Sirin are all convinced of this. Similar are the assertions of Abū Hanifah, Auza'i, Sufyan Thawri, Mālik and Shāfi'i. These persons have, in support of their contention, quoted a tradition wherein it is mentioned, "A certtrin person had made a Will directing setting up at liberty his six slaves after him. That person had no other property except those slaves. The Prophet, therefore, by drawing lots among the slaves set only two of them free and the remaining four of them were left slaves as usual". Hence, these latter jurists maintain that here the Will was made in favour of distant ones.⁷⁴ Ibn Hazm, in answer to the said argument, maintains that there is no clarification in this tradition whether the said incident occurred after the revelation of the verse governing Wills. It is possible that the incident may have occurred prior to the revelation of the said verse and at that time making of such a Will may have been valid, and by the revelation of this verse, it may have been abolished, later. Hence, according to Ibn Hazm this tradition stands abrogated by the said verse.⁷⁵

Modern Lagislation :

According to Imam Ibn Hazm, the directive regarding the Will in favour of non-heir relatives is obligatory whereas, according to the Four *A'immah*, it is based on 'beneficial desirability'. According to Shi'ah Imamiyah as well, the making of Will is desirable. Consequently the point of view of the Four *A'immah* has been followed by the whole Muslim community. But recently in several Muslim countries, Will in favour of orphan grandsons and orphan granddaughters, out of the estate of their grandfather has been provided as "obligatory". The law that has been framed in this connection in Egypt and other Muslim countries is as under :

Egyptian Qanun al-Wasiyyat, 1946 :

Section 76. When a legator during his lifetime makes no Will in favour of the issues of his deceased's children or the death of some of his issues occurs simultaneously with the death of the legator though the death may be said to be *hukmi*, the Will in favour of his issue to the extent of one-third of the estate or the share that he might have received from the father if he had been alive, shall be considered to be obligatory. The condition, however, is that the issues of the deceased's issue at that time must be non-heir and the

⁷⁴Ibid, pp. 384-85.

⁷⁵Ibid, p. 385.

deceased legator must not, in some other way, have given him without consideration, that much to which he might have been entitled by way of inheritance. If he (the deceased) may have given (to the *Mahjub*) and that may have been less than what he was entitled to, the Will to the extent of that much shall be considered to be obligatory which makes up his entitled share.

And the Will shall take effect in favour of daughter's issues of the first degree and in favour of the son's progeny of all degrees, howsoever low they may be. Every principal shall exclude his issues. The principal (heir) shall be considered excluder (*Hajib*) of his own lower branch and shall not be considered to be the excluder of the branches of other degrees. The share of every principal shall be divisible among his branch (issues) of howsoever low they may be. This division shall be made in accordance with the division of the estate that would have been made if the principal is alive and in the event of his death would have been made to his heirs by giving their shares in the estate. In (case of) their deaths regard shall be had of the sequential order of death occurring in their grades.

Section 77. When a deceased person had a Will of more than the obligatory share in favour of a person in whose favour the making of the Will was obligatory, the rule of optional Will shall apply to the extent of the excess share. If the Will had been of less than the obligatory share, the quantity of the obligatory share shall be made up.

If the obligatory Will is made in favour of some and is not made in favour of other entitled ones, the persons in whose favour the Will is made shall be entitled to it in accordance with their shares and those in whose favour it is not made or is made in lesser quantum then it is obligatory to make up their shares from the remaining of one-third of the estate. If that one-third is not sufficient for making up their legal entitlement, the share of the optional Will shall be included therein.

Section 78. The obligatory Will as regards execution shall have preference over all other Wills.

If a legator does not make a Will in favour of such persons who are held entitled under an obligatory Will, rather he, as against them, makes a Will in favour of strangers, every legatee entitled under obligatory Will shall be held entitled to his share from the remaining one-third of the legacy. If the remaining one-third is insufficient for their shares their entitlements shall be made up from the quantum contained in the Will made in favour of the strangers.

Section 79. Directives contained in each of the two afore-mentioned Sections having been observed, whatever is left over shall, in view of the directions in the optional Will, be divided among persons entitled in accordance with their shares under the optional Will,⁷⁶

Tunisian Law :

The provisions of law, basically, have been framed on the same pattern, in Tunisia, Syria and Iraq. The relevant law framed in Tunisia is as under:-

Section 191. The person who dies leaving behind (alongwith his own issues) his grandsons and his daughter's sons whose father or mother (legator's sons and daughters) had died during his lifetime or alongwith him, it shall be obligatory to give in the form of his 'Will' to those grandsons and daughter's sons such shares that their father or mother might have received from their ancestors on their death had they been alive. But this share shall not exceed one-third of the estate.

But these persons (the grandsons, granddaughters, daughter's sons and daughter's daughters) shall not be entitled to the legacy under the said 'Obligatory Will' in the circumstances as under :-

- (a) When these persons are (themselves, directly) heirs to the principals of their parents i.e. the grandfather or the grandmother.
- (b) When the grandfather or the grandmother during their lifetime have made a Will in favour of their *Mahjūb* grand children or have given them, without consideration, property through a covenant in the manner of 'Obligatory Will'. If the Will made is for a quantum lesser than that of an 'Obligatory Will', the deficit shall be made up to the extent of the obligatory Will. If the same is for a quantum higher than the limit of an obligatory Will, the general provisions relating to the optional Will shall apply to the excess quantum.

The 'Obligatory Will' shall have preference over the 'Optional Will'. When there is conflict between optional Wills, the division between them shall be made proportionately. In all other cases, the Wills shall be considered to be equal.

Section 192. The effectiveness of the Will shall remain limited to the issues of the first grade only—of the sons and daughters, and the manner of

⁷⁶*Qanūn al-Wasiyyat al-Miṣri*, 1946, Chapter 6, *Wasiyyat al-Wajibah*, sections 76-79.

division among them shall be that of a male getting equal to the share of two females.⁷⁷

Syrian Law :

The provisions of law relating to 'Obligatory Will' that are enforced by "the Syrian Qanun Al-Ahwal al-Shakhsiyyah" are as under :

Section 257. (1) If after the death of a person the issues of his deceased issues are living, though his own issues may have died with him, the one-third of his estate shall compulsorily be for the issues of his deceased's "children" on the conditions as are stated hereunder :-

- (a) Will in favour of grandsons and granddaughters shall be obligatory to the extent of the share which their father would have inherited from his ancestor if the ancestor had been alive and had died during his (deceased father's) lifetime. But its quantity shall not exceed the one-third.
- (b) When the aforesaid issues are held as heirs to the ancestor, i.e. to the grandfather or the grandmother or a Will has been made in favour of the said issues, or the ancestor during his lifetime has given them without consideration in some manner the property to the extent of the obligatory Will, if however, only a quantum given or a Will is made of less than the quantum of the obligatory Will, the said quantum shall be made up. If the given quantum or the quantum under the Will is in excess of the quantum of the obligatory Will, the rule of optional Will shall apply with respect to the excess quantum. If it has been done in favour of some of the issues only, the remaining ones shall get their shares in accordance with the quantum of the 'obligatory Will'.
- (c) The Will shall take effect (successively) in favour of the issues of the sons and of the issues of the grandsons. The manner of division shall be "a male's share equal to the share of two females" ، "للمذكر مثل حظ الانثيين" In this connection, every principal shall bar out his own branch, not the branch of the other principal, and every branch shall be entitled only to the share of his own principal. The execution of the 'obligatory Will' shall have preference over that of the 'optional Will' which shall be limited only to the one-third of the estate.⁷⁸

⁷⁷ *Majallatul-Aḥwāl al-Shakhsiyyah*, Tunis, Chapter 5, sections 191-192.

⁷⁸ *Qanūn al-Aḥwāl al-Shakhsiyyah*, Syria, Chapter 5, *Wasiyyat al-Wajibah* section 257.

Critical Analysis :

The law regarding 'Obligatory Will' had at first been framed in Egypt. Several other countries like Tunisia, Syria and others followed the suit. Thus, the provisions of law on this subject in other countries are more or less the same as of Egypt. For the sake of convenience, the relevant Sections of Egyptian Law only have been referred to in the discussion below :—

The definition of Will in Section 1 of the "Egyptain Law of Wills, 1946" runs as under :-

"Disposition of legacy by one-third with reference to the period after one's death is called Will".⁷⁹

Disposition with reference to the period after death means that the maker of the Will directs such disposition in his lifetime but its taking effect is postponed till his death. The fundamental principle underlying Will is that it is in all conditions an optional disposition. Islamic Shari'at does not recognise a Will independent of the will of the legator except that it has been made obligatory by the decree of the court. Same is the rule recognized by the generality of the jurists and it has ever remained in practice. But against this view and practice of the 'Ummah, under Egyptian Law of Will it has been held per section 76 of the aforesaid Act that the Will in favour of those grandsons and granddaughters whose father or mother have died during the lifetime of their grandfather or grandmother, is obligatory, in cases where they stand deprived of their inheritance through the presence of a relative nearer than themselves (any son and daughter of the deceased). Accordingly, it has been provided under Section 76 that when the grandfather or the grandmother during their lifetime have not made a Will in favour of the issues of their deceased son or daughter, of such a share which the deceased son or the deceased daughter, if were alive, would have got by inheritance, in such an event, the making of Will to the extent of one-third of the estate or equal to the share what the deceased ones must have inherited, shall be obligatory, in favour of the issues of those deceased ones. In fact, the provision regarding Will in favour of non-heir relatives being obligatory (as has also been mentioned in the discussion of the Committee for the Law of Wills) follows the verdicts of Sa'id b. Al-Musayyib, Hasan al-Basri, Ishaq b. Rahwayh, Da'ud b. Ali Al-Zahiri and Muhammad Ibn Hazm al-Zahiri.

⁷⁹ "الوصية تصرف في التركة مضاف الى ما بعد الموت"، 79

For considering the Will being obligatory in favour of non-heir relatives, the framers of the Egyptian Law of Wills have relied on the following Qura'nic verse in support of their argument :

“It is prescribed, when death approaches any of you, if he leave any goods that he make bequest to parents and next of kin, according to reasonable usage. This is due from the God-fearing.”⁸⁰ (II : 180).

In his famous commentary, *Aḥkam al-Qur'an*, Al-Jassas writes that “this verse proves the Will to be incumbent because the words of the Qur'an “كتب عليكم” are the clearest proof of its being obligatory in the same way as God has said, “Fasting has been made incumbent upon you الصيام كتب عليكم”. It has been further emphasised upon by saying: “This is due from the God-fearing (حقاً على المتقين). Of all the words that prove obligation there is no stronger word or phrase than what one says, “هذا حق عليك”, it is a right on you; it is obligatory; it is incumbent; it is the duty; it is indispensable. Besides, referring to such persons with the word, “Muttaqin”, pious, is also said for further confirmation, in as much as it is also necessary for people to make themselves pious, God has said, “يا ايها الذين آمنوا اتقوا”, O'ye Believers! fear God. There is no difference among the people believing in Islam on the point that it is obligatory on every Muslim to be pious. Hence, when making of the Will has been held to be an act of piety, the obligatory character of the Will itself becomes clear.⁸¹ But Imam Jassas, after the above observations, has also reported unanimity of all the commentators of the Qur'an on the point that Will in favour of parents and relations was obligatory by virtue of this verse but its obligatory nature was abrogated after the revelation of the verse(s) relating to inheritance. The said verses are as under :—

“Allah thus directs you as regards your children's (inheritance) to the male, a portion equal to that of two females: if only daughters, two or more, their share is two-thirds of the inheritance, if only one her share is a half.

For parents, a sixth share of the inheritance to each, if the deceased left children; if no children, and the parents are the (only) heirs, the mother has a third; if the deceased left brothers (or sisters), the mother has a sixth...” (IV : 11).

⁸⁰ *Al-Qur'ān*; Surah, *Al-Baqarah*, ii : 180 :

“كتب عليكم اذا حضر احدكم الموت ان ترك خيراً الوصية للوالدين والاقربين بالمعروف، حقاً على المتقين”

⁸¹ Al-Jassas: *Al-Jami' al-Aḥkām al-Qur'ān*, vol. i, p. 164.

“In what your wives leave, your share is a half, if they leave no child, but if they leave a child, ye get a fourth. In what ye leave, their share is a fourth, if you leave no child. But if ye leave a child, they get an eighth.”

“If the man or woman whose inheritance is in question has left neither ascendants nor descendants, but has left a brother or a sister, each one of the two gets a sixth; but if more than two, they share in a third.....” (IV : 12).

“They ask thee for a legal decision, say : Allah directs (thus) about those who leave no descendants or ascendants as heirs. If it is a man that dies, leaving a sister but no child she shall have half the inheritance. If (such a deceased was) a woman, who left no child; if there are two sisters, they shall have two thirds of the inheritance (between them). If there are brothers and sisters (they share) the male having twice the share of the female” (IV : 176).

Fakhruddin al-Razi, in his commentary on the verse (II : 180) has quoted some verdicts of the jurists :—

- (a) *Aqrabin* (Relations) means the issues of the deceased. This opinion of Abdul Rahman b. Zaid is ascribed to his father.
- (b) *Aqrabin* (Relations) means all the relations other than the parents. This is the verdict of Ibn ‘Abbās.
- (c) *Aqrabā* (Relations) means all relatives, heir or non-heir. This is the interpretation of those who hold a Will to be obligatory on the basis of relationship but also believe that it has been abrogated.
- (d) *Aqrabā* means those relatives who are not, in a given situation, heirs of the deceased.

The provision of law which relates to Will in the aforesaid verse is also the subject matter of a controversy whether it has been abrogated. Hence, the rule of conduct of most of the commentators and the jurists is that the parents and the relatives who are held heirs, under the verse relating to inheritance, the provision for making a Will in their favour stands abrogated by the verses directing inheritance. So much so that the verse regarding ‘Will’ stands totally over-ruled by the verse regarding inheritance or because of the tradition stated by the Prophet : “God has bestowed upon

every entitled one his right (and) now there is no 'Will' for any heir at all."⁸² Some 'Ulama assert that the verse regarding Will stands abrogated by the verse regarding inheritance and the said tradition both.

The tradition is a single transmission (*Khabar Waḥid*) and the Qur'anic verse can not be abrogated by a single transmission report. This general rule is a principle of *fiqh* as well. Yet as the said tradition has been regularly relied upon and availed of (*istifḍāḥ*) and accepted by all the *A'imma* and, on principle, abrogation by such tradition is held as valid, therefore the Qur'anic verse stands abrogated; the Will for relatives either heir or non-heir does not remain obligatory. So, under *Shari'ah* there is no obligation for making a Will in favour of relatives whether they be heirs or non-heirs.

But the 'Ulamā' who are convinced that making a Will in favour of non-heir relatives is obligatory argue that the verse regarding Will is not abrogated. Its dictates are still in force and shall continue to be in force for ever, in respect of those person who stand deprived of their inheritance on account of some impediment or on account of presence of some relative-heir nearer than themselves. Thus, Will in their favour under the 'verse of Will' holds good and is still obligatory. The meaning of the verse, according to them, shall remain, as usual, constant in favour of such persons who stand related but are not heirs to the deceased. However, the verse shall not be acted upon in favour of those relatives who are heirs under the verse of the Qur'an and are getting their shares of the estate (or who are being held as heirs under the Prophet's tradition). According to these 'Ulama there is another tradition also that holds the Will to be obligatory (*wājib*). This is that the Prophet said, "A Muslim who holds property has no right to pass even two nights without making and keeping a written Will with him".^{82a} From this tradition too, it becomes clear that for a Muslim making a Will is obligatory (*Wājib*). This gets support as referred to above from al-Jassas that the words of obligation *كتب عليكم* by way of confirmation (*iḍkīd*) are present in the verse. It is thus apparent that this tradition also proves the obligation to make a Will. However, now there is consensus of opinion of the jurists that Will in favour of a non-heir is not obligatory. The framers of the Egyptian Law of Will (*Al-Wasiyyat*), however, have preferred the view that the Will in favour of a non-heir relative, in principle, should be made obligatory.

⁸² *Mishkat al-Maṣābiḥ*, Karachi, p. 265.

”ان الله قد اعطى كل ذي حق حقه“ فلا وصية لوارث“

^{82a} Muhammad Yūsuf Mūsa, Dr., Cairo, 1960, p. 340.

Quantum for Obligatory Will :

The quantum for obligatory Will, under the Egyptian Law, for the issues of the deceased shall be according to the share of the deceased which, however, should not be more than one-third of the estate. The determination of the quantum shall be made after meeting the burial expenses and making payments of debts due against the estate. If the share of the deceased son or daughter is more than one-third of the estate, the obligatory Will shall be limited to the extent of one-third only, not to the extent of the share of the deceased which he would have inherited had he been alive, because the right of the issues of the deceased son or daughter, according to Egyptian Law, is based on the obligatory Will, not on the right of inheritance.

For making the grandsons and granddaughters entitled to inherit from the deceased (grandfather), in the event of their being debarred from inheritance, the above-stated provisions have been enacted in the Egyptian Law of Al-Wasiyyah, 1946. Shaikh Abu Zahra giving reasons for framing the said provisions has written, "The reason for framing the said provisions of law is that sometimes a person dies during the lifetime of his mother or father leaving behind his own issues and his other brothers alive. After his death his father or mother too die leaving behind their issues i.e. the brothers and sisters of the deceased and the issues of the deceased son i.e. grandsons and granddaughters. In such a case the issues of the said deceased, after the death of their grandfather and the grandmother (the parents of the deceased) stand debarred. Naturally, compared to their uncles, these issues (are liable to) suffer extreme poverty and vicissitudes of fortune. In such circumstances, when these grandsons and granddaughters are debarred from (direct) inheritance they become prey to the untold misery and troubles. Hence, the afore-said Sections 76, 77 and 78 have been formulated making the Will obligatory under the Egyptian 'Law of Will', keeping in view such conditions and circumstances of the orphan grandsons and granddaughters in their favour. The purpose of this law is that if a person has several issues and any one of them, during his lifetime, dies leaving behind his issues, thereafter he (the grandfather) dies and the issues of the deceased son, because of the existence of other sons of their grandfather, stand debarred from inheritance, and if the grandfather and the grandmother make no Will in their favour, Will to the extent of one-third of the property belonging to the deceased (grandfather) shall be considered to have been legally made in favour of the grandsons and granddaughters and one-third of the estate shall first be assigned to them. Thereafter, the rest of the estate shall be divided between the heirs."

In consequence of the aforesaid provisions of law two conditions of 'Obligatory Will', as noted below, are established : —

1. After the death of their grandfather and grandmother, grandsons and granddaughters stand in the category of non-heirs. If, however, they become heirs to any part of the legacy, however small it may be, the provisions relating to Obligatory Will shall not apply in their favour. Indeed, if the deceased has made a Will in their favour the rules relating to optional Will shall govern such a will.

2. In cases where the deceased (the grandfather or the grandmother) has not, without consideration, given property equal to their share under obligatory Will to his or her branches or has given property through any other means other than Will, in any manner, for instance, given some through gift or waqf, but the same be less than the share in the obligatory Will, the deficit shall be made up to the extent of the share of the obligatory Will, i.e. to the extent of one-third of the estate.

Unique Law :

The manner in which these sections have been formulated under Egyptian Law of 'Obligatory Will' is unique and its parallel is not to be found in any known school of Islamic *fiqh*. That is to say, the Will shall be held by law to be obligatory and it will be put into effect by operation of law, though the legator may or may not have so intended it. It is also unique that the obligatory Will may be made only in favour of grandsons and granddaughters of the deceased when of their own father or mother, any one of them is dead during the lifetime of their grand parents.⁸³

Section 76, 77 and 78 of the Egyptian Law, in spirit, appear to be based on the opinions of some of the successors of the Companions of the Prophet (ﷺ) like Abdullah b. Abi Awfā, Talha b. Muḥrīr, Fa'ūs, Sha'bi and others and, among the traditionists, Imam Ibn Hazm. These persons on the basis of the verse of the Qur'an (ii : 180) argue that making Will in favour of non-heir relatives is obligatory. If the obligation has not been fulfilled by the deceased, others have the right to fulfil the obligation on behalf of the deceased. Thus, Ibn Hazm in his noted work "*Al-Mūhalla*" writes : "If a person dies without making a Will, it is

⁸³Abū Zuhra: *Aḥkam al-Tarākat wal Mawāris*, Cairo, p. 317 :

"ولكن قانون الوصية اتي بحكم لم يسبق بمثله في المذاهب الاسلامية المشهورة وهوان الوصية تكون واجبة بحكم القانون، و تتمذ بحكم القانون سواء اراد المورث ام لم يرد وتلك الوصية تكون لفرع من يموت في حياة اجدادويه حقيقا او حكما"

obligatory to make disposal by way of Will. It is absolutely necessary to fulfil the obligations of making the Will. It is, thus, incumbent upon every Muslim to make a Will in favour of his non-heir relative. For instance, if a relative due to being a slave or a non-believer is deprived of the inheritance, or some relative of the deceased due to the existence of some other heirs is deprived from inheritance, a Will, in favour of such persons, of a quantum considered proper ought to be made compulsorily. If the deceased has not done so yet they (such deprived persons) have to be given a quantum considered proper by the heirs or the executor".⁸⁴

Ibn Hazm, after these remarks, has proved from the traditions that the performance of such duties by an officer of the Court shall be equally valid. At the same time, he explained that the quantum of Will shall in no case be more than one-third of the estate of the deceased.

The provisions of Egyptian Law appear to have been based basically on this rule of conduct. But Ibn Hazm in his discussion of the meaning of 'Aqārib', 'Relatives' has stated that 'Relatives' here mean only those relatives of the deceased who are related to him from his father's side, or the mother's side or the mother's father's side; no other relatives except these are meant.⁸⁵ This explanation of Ibn Hazm makes it clear that he has not limited the making of the Will to the category of the grandsons and granddaughters only. So the limitation placed under the provisions of Egyptian Law is, even in this context, an innovation. Besides, the aims and objects for enacting the law of 'obligatory Will' that have been referred to above, do not support limitation being put merely in favour of grandsons and granddaughters, as is apparent from the actual provisions of Sections 76-78; rather the preamble warrants obligatory Will in favour of the relatives of the father and mother who are in untold miserable condition, who have no means of livelihood and have no one to take care of them and who are suffering under extreme poverty and destitution. Thus, Will being obligatory in their favour as well shall require justification according to the viewpoint of Ibn Hazm. The limitation set by Egyptian Legislature will, therefore, be inconsistent with its declared aim and object.

Under the Egyptian Law the quantum governed by the law of 'Obligatory Will' shall compulsorily be separated from the estate of the deceased and shall compulsorily be subject to it, whether the deceased intended it or not, and

⁸⁴Ibn Hazm: *Al-Muhallā*, Cairo, vol. vi, pp. 382-383.

⁸⁵*Ibid*, p. 384.

whether he made such a Will or not. This methodology of transfer of property is just the same as that of inheritance proper which compulsorily opens up in the estate of the deceased and his heirs receive their shares whether the deceased intended so or not. But there is a difference between the two methods namely, that in the case of inheritance the heirs become entitled to get their shares of inheritance on the death of the deceased and their rights vest in the property of the deceased whether or not the heirs are desirous of it and make demands for the same. However, the legatees under an obligatory Will shall not be entitled to their shares without making demand for the same, because the Egyptian Law is silent, whether the legatees under an obligatory Will shall be entitled to their shares in the Will on the death of the deceased without their making demands for the same and without their accepting the Will. Hence, the 'obligatory Will', in one view, is in at par with 'Inheritance' and in the other it is merely a 'Will'.

Shaykh Mahmud al-Shaltut, late Grand Mufti of Egypt, in his *Fatawa* has remarked that this law is an addition to the shares fixed by God. It is making a thing obligatory which has itself not been made obligatory by any injunction (naṣṣ) in the Book of God. This principle has neither been laid down through any tradition of the Prophet, nor by any Imam that a matter, which has not been made obligatory under textual manifestations in the Book of God, which neither has been reported from the Prophet and which has not been agreed upon by Jurists-Companions of the Prophet, or the generality of jurists, should be made obligatory on the *Ummah*.⁸⁶

Pakistan Rulings :

Distinction between 'Will' and 'Succession' : The majority of judges of Pakistan Supreme Court elucidating the distinction between 'Succession' and 'Will' in the case of "*Ghulam Sarwar and others vs. Imtiaz Nazir and others*" (PLD 1966 S. C. 559) have laid down : "In the sections of the Punjab Muslim Personal Law (Shari'at) Application Act, 1948 as it stood prior to the Punjab Muslim Personal Law (Shari'at) Amendment Act 1951, the word, "Succession" does not include those 'Wills' that were, prior to the enforcement of the said Amended Act, in favour of such persons who conformed to the customary law". The learned judges have also said, "It is evident that Will may be made in favour of strangers and to that extent it concerns not the 'succession' or the 'inequalities'. Qur'an gives restrictive orders that Will be put in force prior to the division of property among the

⁸⁶Abu Zuhra: *Ahkam al-Tarakat wal Muwaris*, Cairo, pp. 324-26.

heirs. It so appears that 'Islamic Law' and 'Customary Law' in both, the gift made by Will is a kind of the transfer of property which shall take effect after the death of the legator."

Mr. Justice Kaikaus, however, dissented from the above majority view and observed "the ordinary meaning of 'succession' is the transmission by law, or by the will of man to one or more persons of the property and the transmissible rights and obligations of deceased person."

It appears that the dissenting view of justice Kaikaus about 'Succession' and 'Will' is based on the fact that succession may be both testamentary and non-testamentary. According to Imam Zufar, the disciple of Imam Abu Hanifah, 'Will' is a kind of 'inheritance' because in a way the Will is a secession in the same way as an heir succeeds to his ancestor. Under Islamic Law the mandates under Will and succession take effect after the death of the testator and that is why the Will has been called the "sister" of inheritance (أخت الميراث). But according to other Hanafi A'immah the Will in its mandate and application is quite distinct from 'Inheritance' and a distinctive manner of transference of right having 'discretion of the legatee' as its main feature.

Conclusion :

The question of the inheritance of the orphan grandsons and orphan granddaughters is governed by the law of inheritance. It is enough to indicate here that in view of elaborate mandates in the Qur'an respecting inheritance the consensus view regarding Will being desirable (*Mustahab*) act, appears to be, on principle, correct. (For detailed discussion one may look to Tafsir al-Kabir by Imam Razi, Egypt, 1938, Vol. V, pages 67-69. For the question of Inheritance of Orphan grandsons and granddaughters reference may also be had to Chapter XXXIX (Hajab wa Hirmān) *infra*).

Section 228. (1) It is necessary for the legality of a Will that it Propriety of Will should not be repugnant to the purposes of the Shari ah.

(2) Subject to the foregoing provisions, a Will dependent on or attached with some condition shall be considered to be valid.

Explanation : (1) If the attached condition is valid it shall be strictly observed till the expediency of being attached to that Will continues. If, however, the condition is invalid or the purpose of condition is lost its observance shall be discontinued.

(2) A condition shall be deemed to be valid if it is to the benefit of the legator, legatee or of any one else, and the same is not of a prohibited nature nor is repugnant to the purposes of the Shari'ah.

COMMENTARY

Matters for which Wills are made are considered to be of three kinds as under :

1. Obligatory.
2. Optional.
3. Forbidden.

1. Obligatory Matters :

An obligatory purpose of a Will, generally, means a matter which a person is legally obliged to perform as being a *Fard*, *Wajib* or *Sunnah*⁸⁷ in the eye of Shari'ah but he remained unable or indifferent to perform it during his lifetime. For instance, Hajj pilgrimage, atoning payments for not fasting, Zakat (compulsory almsgiving) etc.

2. Optional Matters (Mubah) :

Generally an optional matter means a matter which is permissible and a person is not legally bound to perform; rather it is placed in the category of voluntary or permissible acts or it is considered to be an act of merit in the eye of Shari'ah. For instance, making Will for the poor or for the supply of medicines in hospitals or for the construction of inns, bridges, roads etc. or making a Will in favour of non-heir relatives.

3. Forbidden Matters :

Generally, a forbidden matter means a matter which is considered in the eye of the Shari'ah to be forbidden or amounting to be forbidden or which in the eye of the Shari'ah is not the means for Muslims of seeking nearness to God. For instance, making a Will for temple, cathedral, church etc. or making Will for such a purpose that is not in the interest of either the legator or the legatee or any other person.

Hence, a Will shall fall in any of the above categories. A Will made for matters that are contained in clauses 1 and 2 stated above shall be valid, and making Will dependent on similar matters or attached with such con-

⁸⁷*Nūr al-Idāh*, Karachi, p. 37, (footnote); Abdul 'Alī Baḥr al-'Ulūm; *Fā'idah Jalilah*, Karachi, p. 215.

ditions too shall be valid. Making Will of such matters as are contained in clause 3 stated above or making Will dependent on conditions or attached with similar conditions shall not be valid and the Will shall be void.

Making Will for matters that are not the means of obtaining nearness to God, for example, making Will for churches, or making Will for the supply of arms to the enemy, is void. This is so because the purpose of Will is that whatever virtuous acts have been missed or neglected the legator should be provided for by means of his Will, thus adding to virtuous acts. The Prophet (peace be on him) has said, "God has bestowed (the option) upon you in one-third of your property at the last moment of your life to increase your good deeds." And the aforementioned matters are not included in such good deeds. Hence, Will for their performance, is not valid. If a person makes a Will that his property be sold to a certain person without any concession, according to one Hanafi opinion this Will shall be valid, and according to another, this Will shall not be valid, because in this 'Will' the legatee does not get any benefit. According to this writer the first opinion is preferable as sometimes a property by itself has a value because of its nature, not because of its price. Making Will in favour of a *Dhimmi* (a non-Muslim citizen of a Muslim State) is valid in as much as *Ummul-Mominin*, Haḍrat Ṣafiyah did make a Will of one-third of her property amounting to 30,000 dirhams in favour of her brother who was a Jew. There is, however, some difference of opinion in case of a *Ḥarbi*, non-Muslim belonging to the country of non-believers (*Dār al-Ḥarb*) or *Dar al-kufr*. There is an opinion that making Will in his favour is not valid. The reason is that the purpose of making the Will is to confer benefit on the legatee and the view with regard to a non-Muslim belonging to alien country (*Dār al-Ḥarb*) is that holy war should be waged against *Dar al-kufr* and the *ḥarbi's* property, in such a case, should be considered to be a booty. Hence, making Will in their favour shall not be desirable under the Shari'ah. Another opinion, however, is that the Will shall be valid. This is the approved opinion among the Shafi'is. A Will, their argument runs, makes another person owner of a property, as it happens in sale. Hence, an infidel (of *Dar al-kufr*) as well may be made an owner without any reservation.⁸⁸ According to this writer, however, Will made in favour of a non-Muslim, belonging to *Dār al-Ḥarb* against which the legator's country is at war or there exists a state of war is not valid. Rather, all contracts and obligations between a Muslim and such a *Harbi* will not remain operative.

⁸⁸ Al-Shirazi : *Al-Muḥaḍḍah*, Cairo, vol. i, p. 458,

Making a Will by a Muslim for churches, monastries or for their construction and repairs and for the adornment of idol temples and of other non-Muslim's places of worship, is not valid. Making Will for getting Old Testament, Psalms of David or Bible printed and published, is also not valid because under Islamic dispensation all are held abrogated. But, if a Will is made for the construction of an inn where the infidel travellers or the travellers from a Dār al-Harb (non-Muslim country) may stay, it shall be valid. Even Wills which lack coherence or appear frivolous may be implemented by a rational interpretation of the words. Will for getting religious books published is valid. Will for publishing books advocating innovations in the religion of Islam or which are comprised of the teachings of unapproved sciences is not valid. Will for getting the copies of the Qur'an published for the purposes of their study is valid.⁸⁹

Zahiriyyah's Rule :

It is not valid for a Muslim legator to make a Will for sinful purposes whether the legatee is a Muslim or a non-Muslim. Hence, a person who gives permission to a non-Muslim to commit a sinful act is really the one who bids against the commandment of God. Hence, his act shall be unlawful as it would be helping the commission of a sin.⁹⁰

Syrian Law :

Provisions of law governing the validity or otherwise of a Will under Syrian *Qanun al-Ahwal al-Shakhsiyyah* (Al-Wasiyyat), 1953 are as under :—

Section 209 : For the validity of Will it is a condition that the Will must not be for an unlawful purpose, act or omission.

Section 210 : (a) It is valid to relate a Will to a period in future or to suspend or restrict it by a condition, provided the condition is valid.

(b) That kind of condition shall be considered to be valid in which lies the benefit of some one else also, besides that of the legator or the legatee, and the same is not legally forbidden and contrary to the purposes of Shari'ah.

(c) The condition shall remain valid so long as the intended purpose remains so.

⁸⁹Sharfud-Din Al-Maqdisi : *Al-Iqnā'*, Cairo, vol. iii, pp. 62-64.

⁹⁰Ibn Hazm : *Al-Maḥallā*, Cairo, vol. vi, p. 399.

- (d) When the Will is restricted to or is made dependent upon an invalid condition, the condition shall be void and the Will shall be enforceable.⁹¹

Section 229. (1) It is valid for the legator to revoke his Will whether such revocation is made expressly or impliedly by such an act as may destroy the basic quality or the benefit of the legacy, or it may make such addition to it with which the legacy can not be made over, or it is so used that the legator's proprietorship itself is lost, whether that use be by way of its transfer, by way of creating changes in it or by way of such mixing up that the legacy may not remain distinguishable.

(2) Will may be cancelled by written or oral expressions or by such acts as may indicate the intention of such cancellation.

Explanation 1: For the purpose of this Section a thing shall be said to have been destroyed when its intrinsic worth is so completely changed that ordinarily some other word has to be used for describing it.

Explanation 2: Provided that the intention of cancellation of Will shall not ordinarily be presumed merely because of the fact that from the latter part of the very Will, or from a subsequent Will, the same legacy has been willed in favour of some other person, without mentioning any thing about the Will or earlier legatee. In such events both the Wills shall be considered to be one and the same and the first and the second legatees shall be entitled to the legacies jointly; except when from the conditions and circumstances of the deed of Will the intention of the legator appears to be otherwise or when both the Wills are so inconsistent that interpretation as to validity of both the Wills leads to absurdity.

⁹¹*Qanūn al-Aḥwāl al-Shakhsiyyah*, Syria, 1953.

COMMENTARY

It is evident from the foregoing Sections that the time of the acceptance of the legacy by the legatee and his getting proprietary right established over it depends on his accepting the Will after the death of the legator. On this basis, the legator has the right, during his lifetime, to revoke the Will made by him although the legatee may have, during his lifetime, accepted it. The reason is that the proprietary right of the legatee shall vest only after the death of the legator, not in his lifetime. Hence, the legator, as long as he is alive, has the full right and authority of revoking his Will or effecting changes in it.

Hanafi's Rule :

As the Will, according to the four *A'imma*h, is not obligatory upon the legator, it is rather in the category of voluntary acts; hence, the legator in his lifetime has always the right of revoking it.

Revocation can be classed into two kinds:—

(1) Express, (2) Implied.

(1) *Express* : The legator may revoke the Will by expressing in clear words that he revokes his Will.

(2) *Implied* : Revocation by implication may be achieved in two ways:

(i) By means of acts, and (ii) by means of words other than express.

(i) The legator acts in a manner that establishes the fact of his having revoked the Will. For instance, he makes a Will of a piece of cloth, but thereafter he cuts it up and makes a shirt or a cloak out of it; or he makes a Will of cotton, but thereafter gets it spun and woven in a cloth and so forth; or sells, or makes a gift or makes charitable offering of the property Willed by him.⁹²

(ii) The legator at first makes a Will of the one-third part of his property in favour of a person. Thereafter, he makes a Will of the same one-third part of his property in favour of another person saying in so many words that the one-third part of his property given to so and so under Will, is now being given away by means of Will to another such and such person. This shall be revocation of his first Will.⁹³

⁹²Imam Sarakhsi : *Al-Mabsut*, Cairo, vol. xxvii, p. 161.

⁹³Imam Kasāni : *Al-Bada'i 'al-Sana'i'*, Cairo, vol. vii, pp. 378-79.

The Hanafi jurists have laid down a principle in connection with making two Wills, one after the other, concerning the same property. That is, if the two Wills made one after the other are such that they negate each other, the second Will shall abrogate the first Will. In other words, it shall be the means of having revocation of the first Will. If, however, there is no mutual contradiction in both the Wills, both of them shall take effect. The second one shall not be the cause of the revocation of the first one. For instance, a person at first makes a Will of his house in favour of a person. Thereafter, he makes another Will of the same house to another person. The second Will shall not be considered to have revoked his first Will. Both the Wills shall take effect because the one does not actually reverse the former Will nor cancels it. Both purport to effect transfer of ownership on them. Hence, according to Hanafis, half of the legacy (the house) shall belong to the first legatee and the other half of it shall be that of the other legatee. If however, the house is, at first, under a Will, given in Waqf, thereafter the same house, is, under another Will, is to be sold, or the process of transfer is reversed, the second Will shall be considered to have revoked the first Will, in as much as both these Wills negate each other. Both of them cannot be reconciled with each other. The creation of Waqf is the negation of transfer by sale and the transfer by sale is the negation of the creation of Waqf. Hence, the act of creating the second Will is a proof of the fact of the revocation of the first Will.

The second principle can be explained that a property is, at first, under a Will, given to a person but thereafter the same property, under another Will, is given to another person. In case the first Will is mentioned in the second Will, the latter shall be considered to be the revocation of the first Will. If there is no mention of the first in the second Will, both of them shall be considered to have been made in favour of both the legatees jointly. The rule is that a property when given under Will to two persons, one after the other, both of them shall be considered to be the co-legatees in it because both the Wills, as far as possible, shall thus be held effective. The real principle is to implement a wise man's utilization of his property in a way that his disposition must be saved from becoming invalid. In case, the first Will is not referred to but it is considered to have been revoked by the second Will, one Will shall necessarily become altogether void. But, if meaningful intention of creating two legatees is accepted, each of the two Wills shall be equally effective. Hence, as far as possible, the principle of joint legatees shall be upheld. However, if at the time of creating the second

Will it is said that the property respecting which the first Will has been made, the same property, now by this Will is made over in favour of such and such another person and the property shall now belong to him, the principle of joint legatees shall not apply. On the other hand, if it is said that the property respecting which the Will has been made in favour of such and such person the subsequent Will is also being made respecting the same property, the principle of joint legatees shall apply in that case.

According to Abu Yusuf the denial of a Will having been made amounts to its revocation. According to Muhammad Al-Shaybani, however, it shall not be so held.⁹⁴ This writer finds himself in agreement with Abū Yūsuf.

On the question of revocation of a Will, it is written in "*Sharh Al-Akham Al-Shari'ah*" by Zaid al-Abyani that revocation shall either be 'Express' or 'Implied'. In case of express revocation the legator says that the Will made by him in favour of so and so is revoked or has been made void by him or that whatever Will may have been made by him is void. In case of implied revocation the legator acts in a manner that establishes the fact of his having so revoked the Will. There may be several instances of the same :—

1. The description by which the legacy is indicated at the time of the creation of Will gets changed by the act of the legator and its basic qualities are changed or nullified. For instance, the legator makes a Will respecting chips of gold, and then they are made into golden ornament, or he makes a Will respecting bales of cotton, but later the same is woven into cloth, or he makes a Will respecting cloth and the cloth is sewen into garment.
2. The act of the legator results in such disposal of the legacy that it becomes the property of another person. For instance, he sells the legacy or makes a gift of it. However, if the legator's disposition is such that his proprietary right in it is not extinguished, the Will shall not be considered to be void, for instance, he lends it to someone or gives it to someone on rent.
3. The act of so mixing the legacy with another thing that its differentiation becomes difficult and it is entirely changed, for instance, the mixing of barley with wheat. Such mixture shall be considered to be in the degree of changing the legacy and the Will shall become void.

⁹⁴Al-Kāsānī : *Al-Bada'ī 'at-Sana'i'*, Cairo, vol. vii, p. 380.

But diminution in the legacy shall be no impediment to the taking effect of the Will. For instance, a building is given under a Will to a legatee, thereafter the building is demolished. This act of the legator shall not be the cause of making the Will void. (Note:—This question has been dealt with in this way by old *fiqh* treatises). The jurists dealing with this question have used the word '*Al-Dār*'. In Arabia, a big compound having numerous small rooms with a big courtyard in its middle was commonly called '*Al-Dār*'. They had, therefore, held the land within such compound as the basic property and the rooms constructed thereon as appertenances and accretions to *Al-Dār*. On this basis, their demolition was considered to be a minor intermeddling with the property, not with the *corpus* itself. But nowadays the word "building" is used for the 'building constructed on the land' i.e. the whole land with the constructions thereon is called *Al-Dār* (building). The land alone is not now called a 'building'. Hence, according to common parlance these days, the demolition of the building shall be considered to have wrought the change in the *corpus* of the property itself, not merely in its qualities, and the legacy shall be considered to have been changed. Hence, if the legator makes the Will regarding a building in favour of a legatee and thereafter gets the building demolished, this will amount to negating the legacy and, in the circumstances, the Will ought to be held void. But if the building gets demolished due to passage of time or due to some other causes without the intervention of the legator it shall not amount to its being lost or spent out and it shall not become the cause of the cancellation or failure of the Will because the diminution in the legacy is no reasonable cause of the voidance of Will; and in such circumstance the Will shall take effect to the extent of the remaining part of it. A building consists of both the constructions upon it and the land. After the constructions are demolished, the land remains intact; hence the Will shall be held to be operative to that extent. The diminishing, in such an event, of the legacy is no bar to the Will being operative.

If there exists no building altogether, rather instead of a building there lies an open land, in that case the word "building" cannot be used. Rather it would be said that the 'building' stated in the Will does not exist and the Will ought to be held as void in as much as the change is not in the attribute but is in the corpus of the legacy itself. If a Will is made of open land, thereafter the legator gets a building erected on it, the Will regarding the open plot of land shall be void. If the legator makes a Will of single storey building, thereafter one or two more storeys are got constructed thereon by him, in such an event if the upper floors are dependent upon the ground floor, the entire building shall belong

to the legatee. If the upper storeys are independent of the ground floor, for instance, they have their separate stairs or have stairs from outside, they shall be excluded from the legacy.

If the legacy gets spent out or destroyed during the lifetime of the legator, the Will shall become void. If, however, the legacy gets destroyed after the death of the legator by the commission or omission of the act of the heirs, damages shall be recovered from the heirs, though the destruction may have taken place prior to or after the acceptance by the legatee, because the heirs, after the death of the legator, are deemed to be trustees in respect of the legacy. If the heirs failed to act like reasonable careful persons they shall be liable to pay damages. If, however, at the time of the death of the legator the legacy is in possession of the heirs and no act of malafide with respect to it is committed by them or on their behalf, they shall not be held liable, because unless some malafide act from their side appears to have been done they can not be held responsible for the same. A trustee is never considered accountable without his acting in malafide manner. This is the reason as to when the heirs act malafide regarding legacy transgressively, they have to pay damages for the legacy to the legatee, though the legatee may have accepted the legacy prior to or after its destruction. The same shall happen in case the legatee after accepting the legacy under Will demands its possession from the heirs and they, inspite of their ability, do not make over its possession to the legatee and the legacy thereafter gets destroyed. The legatee then, in its place, shall be entitled to recover damages from them. Although the destruction of the legacy may have taken place without the act or omission of the heirs, yet as they without any right inspite of their ability had not made over its possession, their act will be considered as malafide and they shall have to pay damages for the same.

Maliki Rule of Conduct :

Revocation of Will may be made both by words and deeds. After such revocation, either in the state of health or of sickness, the Will shall become void. Having revocation by words is simple. On the contrary, acts mentioned below shall be considered as amounting to revocation:—

The legacy is sold. The yarn is woven into cloth. The crop after being reaped is taken possession of by the legator. The legacy is so converted as held to be a different article.

If the legator makes his Will conditional on the happening of his death by a named illness or by the happening of his death during a travel to a particular place but he survives the named illness or that journey, the Will

shall become void. If the legator makes an absolute Will and does not make it conditional on an illness or death during a particular journey and makes over a written Will to the legatee but he survives the illness or returns safe from the journey and the written Will is not taken back or revoked, the Will shall be valid.⁹⁵

The Acts not amounting to Revocation :

If the legator after making a Will of open plot constructs a building thereon, the Will shall not be void (nor shall it be considered as having been revoked); rather the legator shall be considered to be the co-owner of it with the legatee. (The building shall belong to the legator and the land shall belong to the legatee). If a person makes a Will of a building or the land in favour of an issue of Z, but thereafter makes Will of the same in favour of A, they both shall be considered to be the co-owners of half and half of the building and the land. The Will made in favour of Z, shall not be considered to have been revoked by the Will made in favour of A. Likewise, mortgaging the legacy does not make the Will void (it is not considered as having been revoked). Similarly, if a Will is made regarding one-third of a property, thereafter by the sale of some part of it some other property, proportionate to it, is purchased, or a Will is made regarding some cloth, thereafter by the sale of it some other cloth in its place is purchased, the same shall not be considered as acts of revocation. In the same manner the act of getting a building plastered or oil-painted shall not be considered acts of revocation.⁹⁶

Shafi'i Rule :

A legator during his lifetime has at all times the right of revoking his Will. If, however, debts and obligations are acknowledged in the Will the same cannot be retracted. Revoking or effecting changes in charitable payments shall, however, be valid.⁹⁷

The revocation of Will either by 'words' or 'deeds' shall be valid. Hence, a statement by the legator, after a Will is made, that the property is for his heirs, shall be considered as his having revoked the Will. If a Will is made regarding a particular thing in favour of the issues of a person, thereafter another Will regarding the same is made in favour of another person in accordance with the Shari'ah, this act shall, as per Shafi'is, be

⁹⁵Al-Ābi : *Jawāhar al-Aklil*, Cairo, vol. ii, pp. 318-19.

⁹⁶Ibid, p. 319.

⁹⁷Imam Shafi'i : *Kitab al-Umm*, Cairo, vol. iv, p. 118.

considered as the revocation of the first Will made in favour of the issues of the first person. If after making a Will the legator says that it (the property) forms his heritage, the assertion has been interpreted in two rulings : The one is that it shall be considered as having revoked the Will. The second is that it shall not be so considered because there is a form of legacy in the Will as well. After the making of a Will, if the legacy is sold, or is made a gift of or is willed to be sold or gifted away, all these acts shall be construed as revocation of the Will.⁹⁸

After the making of Will regarding a fixed quantity of grain it is mixed up with another grain, not the subject matter of the Will, or the grain is sowed in the field or bread is prepared out of its flour or cloth is made from the bequeathed cotton thread or after cutting such cloth garments are made, in all these cases the Will shall be considered as having been revoked.⁹⁹

Hanbali Point of View :

Revocation of Will both by words or acts is valid. For instance, if it is said, "I revoke my Will", or "I make my Will void", or "I have changed my Will", or "The legacy now belongs to my heirs", "It shall be my heritage", it shall be considered that the Will has been revoked. Likewise, if one says, "The thing that I gave under Will to "Z" shall belong to "A" then "Z" shall not be entitled to that thing and it shall belong to "A". If a Will is made of a part of one's property at first in favour of a particular person or a Will is made of the whole property at first in favour of a certain person, thereafter it is made in favour of another person, in such events both the persons shall be considered to be co-sharers in part or the whole of the said property, as the case may be. If out of the two or three legatees one dies or one rejects it, the whole shall belong to the rest of the legatees.

Revocation by act is like this : the legator after making the Will sells the legacy, or makes a gift or a donation of it, or mortgages it, or uses it for his own purposes, or for feeding others, or makes an offer of sale of the legacy, or tells a purchaser that he has offered the legacy to him, though he (the purchaser) may not have yet accepted the offer, or he makes a Will for the sale or donation or gift of the legacy, or earmarks the legacy as dower of a woman, or as compensation in the case of *khul'a*, or gives it away in payment of rent, or makes such use of it that the legacy is altogether changed in its character, condition and purpose, in all such cases it shall be

⁹⁸Ibid.

⁹⁹Ibid; Al-Shirazi : *Al-Muhazzab*, Cairo, vol. i, pp. 468-69.

considered that it has been revoked by the subsequent acts. But such utilisation thereof which does not change the purpose of the property nor is it of a permanent character, rather it is always possible to reverse such use, or the use terminates after the lapse of a fixed period, in such cases it shall not be considered that the Will has been revoked. Accordingly giving the legacy on rent, cultivating the fields given away in Will or mixing up the legacy with such things that its separation from those things is possible, shall not be considered as revocation of the Will.¹⁰⁰

Zahiri Rule :

According to Zahiris, it is valid for a legator to revoke all kinds of a Will with the exception of the emancipation of slaves under his ownership.¹⁰¹

Modern Legislation :

Egyptian Law : The law concerning the revocation of the Will as in force in Egypt is as follows :

Section 18. It is valid for the legator to revoke expressly or impliedly the whole or part of the Will. Revoking the Will by any such act or utilization that is proved by its circumstances or usages shall be held as valid. Such revocation shall also be considered as valid, which is the cause of abatement of the legator's proprietary right in the legacy.

Section 19. Denial or repudiation of a Will made or demolishing the construction of the building of the legacy or acting in a manner that changes the name of the legacy or becomes the cause of nullifying some of its attributes shall not be credible for the purpose of revoking a Will nor shall an act be considered as revocation, on account of which the legacy is so increased that without that increment the possession of the legacy can not be made over to the legatee, unless there is a circumstance or usage which proves that act to be amounting to revocation.¹⁰²

Pakistan Rulings :

The Lahore High Court in the case of *Sardar Bibi vs. Abdul Latif* has held that certain property was made the subject of a bequest in favour of the

¹⁰⁰Sharfud-Din Al-Maqdisi : *Al-Iqnā*, Cairo, vol. iii, pp. 54-55 :
Abū al-Barakāt : *Al-Muharrar*, Cairo, vol. i, p. 376.

¹⁰¹Ibn Ḥazm ; *Al-Mohalla*, Cairo, vol. vi, p. 416.

¹⁰²*Qanūn al-Wasiyyah*, Egypt, 1946.

testator's daughter. Subsequently the testator gifted away his entire property to her. The Will was impliedly revoked and it was no longer in force.¹⁰³

Section 230. A Will shall become null and void—

Nullity of
Will

- (1) By the legator becoming permanently mad;
- (2) By the death of the legatee prior to the death of the legator;
- (3) By the apostasy of the legator or the legatee;
- (4) By the legacy getting destroyed prior to its acceptance or the legatee being killed prior to its acceptance.
- (5) By the rejection of the legacy by the legatee after the death of the legator;
- (6) On murder of the legator by the legatee;
- (7) By the establishment of another person's right over the legacy;
- (8) By any other lawful cause that renders the Will to be void.

COMMENTARY

Wills may be made void in three ways as follows :—

- (1) By the use of clear expressions as, "I make the 'Will' void, or "I cancel the 'Will', or I break up the 'Will' or 'I do revoke the 'Will'.
- (2) By taking measures leading to the voidance of a 'Will'.
- (3) Wills becoming void under legal necessity.

Examples of such revocations have already been stated under the preceding section on revocation. Besides, the Will becomes void by the permanent madness of the legator, by the death of the legatee prior to the death of the legator, and by the legacy getting destroyed or the legatee being

¹⁰³P.L.D., 1952, Lahore, p. 294.

killed, prior to its acceptance by the legatee provided the property in legacy be certain and identifiable.¹⁰⁴

Wills made by non-Muslims of an Islamic country (*Dhimmi*) may be classified into three kinds : The purpose for which a Will is made may be, both from Islamic as well as their own point of view, the means of getting closer to God; or it shall be the means of getting closer according to Muslims, but not according to them; or it shall be such a means according to them but not according to Muslims. The Will in the first case shall unanimously be valid. For instance, if the Will is made for poor Muslims or for poor non-believer subjects of an Islamic state or for the emancipation of the slaves or for the construction of masjid Aqsa. These are all, according to Muslim as well as the Non-Muslims, the means of attaining pleasure of Allah. The Wills in the second case are those that are, according to Muslim, the means of attaining pleasure of Allah, for instance, Will made for pilgrimage to Mecca (Haj). According to Muslims it is the means of attaining pleasure of Allah whereas for the non-Muslims it is not so. Wills made by non-Muslims for the construction of a mosque, other than Masjid Aqsa, shall be unanimously invalid for Muslims because such an act on the part of non-Muslims shall, in fact, be ridiculing the Muslims. The Wills in the third case are those that are, according to non-Muslim alone, the means of attaining nearness to God, for instance, making Wills for churches etc. On this question there is a difference of opinion between Abū Hanifah and his two illustrious disciples. According to him such Will shall be valid, whereas according to the latter such Will shall not be valid.¹⁰⁵ According to this writer, the opinion of Abū Hanifah appears to be justifiable as it is in conformity with the religious tolerance as ordained by Qur'an, provided the same be constructed in the non-Muslim populated areas.

Void Wills—Maliki View :

All Wills for sinful objects are void. The Wills shall also be void when the legator or legatee becomes apostate.¹⁰⁶

Alterations :

A Will is made regarding a building. The building, after the death of the legator, gets demolished and there is left an open land. Whether the Will, in such circumstances, shall become void ? There is a difference of opinion on

¹⁰⁴ Al-Kasāni : *Bada'i' al-Sana'i'*, Cairo, vol. vii, p. 394.

¹⁰⁵ Ibid, p. 341.

¹⁰⁶ Al-Ābi : *Jawāhar al-Aklil*, Cairo, vol. ii, p. 318.

killed, prior to its acceptance by the legatee provided the property in legacy be certain and identifiable.¹⁰⁴

Wills made by non-Muslims of an Islamic country (*Dhimmi*) may be classified into three kinds : The purpose for which a Will is made may be, both from Islamic as well as their own point of view, the means of getting closer to God; or it shall be the means of getting closer according to Muslims, but not according to them; or it shall be such a means according to them but not according to Muslims. The Will in the first case shall unanimously be valid. For instance, if the Will is made for poor Muslims or for poor non-believer subjects of an Islamic state or for the emancipation of the slaves or for the construction of masjid Aqsa. These are all, according to Muslim as well as the Non-Muslims, the means of attaining pleasure of Allah. The Wills in the second case are those that are, according to Muslim, the means of attaining pleasure of Allah, for instance, Will made for pilgrimage to Mecca (Haj). According to Muslims it is the means of attaining pleasure of Allah whereas for the non-Muslims it is not so. Wills made by non-Muslims for the construction of a mosque, other than Masjid Aqsa, shall be unanimously invalid for Muslims because such an act on the part of non-Muslims shall, in fact, be ridiculing the Muslims. The Wills in the third case are those that are, according to non-Muslim alone, the means of attaining nearness to God, for instance, making Wills for churches etc. On this question there is a difference of opinion between Abū Hanifah and his two illustrious disciples. According to him such Will shall be valid, whereas according to the latter such Will shall not be valid.¹⁰⁵ According to this writer, the opinion of Abū Hanifah appears to be justifiable as it is in conformity with the religious tolerance as ordained by Qur'an, provided the same be constructed in the non-Muslim populated areas.

Void Wills—Maliki View :

All Wills for sinful objects are void. The Wills shall also be void when the legator or legatee becomes apostate.¹⁰⁶

Alterations :

A Will is made regarding a building. The building, after the death of the legator, gets demolished and there is left an open land. Whether the Will, in such circumstances, shall become void ? There is a difference of opinion on

¹⁰⁴Al-Kasāni : *Bada'i' al-Sana'i'*, Cairo, vol. vii, p. 394.

¹⁰⁵Ibid, p. 341.

¹⁰⁶Al-Ābi : *Jawāhar al-Aklil*, Cairo, vol. ii, p. 318.

this question. It is, however, stated that if the legacy gets destroyed before its acceptance either during the lifetime or after the death of the legator, the Will made in favour of the legatee shall become void.¹⁰⁷ According to this writer, the Will shall be valid in as much as the land forms part of the building which was demolished without an act of legator.

Modern Legislation :

Egyptian Law :

Section 14. A Will shall become void by such madness of the legator that continues upto his death. The Will shall also become void where the legatee dies before the death of the legator.

Section 15. A Will shall become void when the property in legacy is definite and gets destroyed before its acceptance by the legatee.

Section 16. A Will made by the legator, after being barred from utilizing his property on account of immaturity of mind or gross negligence, shall not be void.¹⁰⁸

Tunisian Law :

Section 197. The undermentioned circumstances shall make the Will void :—

1. When the insanity of the legator continues till his death;
2. When the legatee dies before the death of the legator;
3. When the specified legacy gets destroyed before the death of the legator;
4. When the legatee rejects the Will after the death of the legator.

Section 198. Assassination of the legator by the legatee shall be the cause of the assassin being debarred from getting the optional or obligatory Will.

Similar will be the case whether the assassination is wilful or is caused indirectly, whether the assassin himself assassinates or associates with and becomes conspirator or instrument of the assassin, or is the cause of death of the legator by giving false evidence against him; Provided such conditions are without any legal excuse and the assassin is of sound mind and of thirteen years of age.

¹⁰⁷Sharfud-Din Al-Maqdisi : *Al-Iqnā*, Cairo, vol. iii, p. 70.

¹⁰⁸*Qanūn al-Wasiyyat*, Cairo, 1946.

Section 199. A Will becoming wholly or partly void, the legacy shall be treated as the estate left by the legator (to be divided among his heirs).

Besides the aforementioned Sections, the one hereunder also forms part of the Tunisian Law which, though not concerned with the voidance of Will, has a consequential effect of making a Will as void.

Section 185. When the specified legacy gets destroyed or the right of someone else gets established over it, the legatee shall not be entitled to that legacy. If, however, a part of the legacy gets destroyed or is proved to be under the mortgage or as security with others, the remaining part thereof only shall belong to the legatee.¹⁰⁹

Syrian Law :

Section 220. A Will shall be void in the following circumstances :—

- (a) When the legatee dies before the death of the legator ;
- (b) When the legator permanently suffers from insanity ending with his death ;
- (c) When the property in legacy is specified and gets destroyed before the death of the legator ;
- (d) When the legatee rejects the Will after the death of the legator;
- (e) When the legator expressly or impliedly has revoked his Will.

Section 221. All such acts or utilisations that circumstantially or in usage prove revocation shall be construed as revoking the Will, although the legator has not specifically mentioned about revocation.

Section 222. Refusal of putting the Will in force or acting in a manner that causes such an addition to the legacy without which it is not possible to deliver it to the legatee, shall not be considered as revoking of the Will.

Section 223. Matters stated hereunder shall be deemed to be depriving a legatee of an optional as well as an obligatory Will:—

- (a) When the legatee intentionally assassinates the legator, whether he does it himself or does it in conspiracy with others, provided that

¹⁰⁹ *Majalla al-Ahwāl al-Shakhsiyyah, Tunis, Chapter 7.*

the assassination is carried out unjustifiably without any right or lawful cause and the assassin is of sound mind and an adult of fifteen years of age;

- (b) When the legatee intentionally becomes the cause of the assassination of the legator. His adducing false evidence ending in the assassination of the legator shall amount to such cause.

Section 224. When a Will of property in its entirety or a specified part thereof is held to be void or has been rejected by the legatee it shall be considered as void and the same (full or part, as the case may be) shall be included in the legator's heritable property.

Section 243. (1) When the Will is in respect of a fixed item of the estate or is in respect of a particular kind of the items and the said legacy gets destroyed or the right of some other person gets established over it, the legatee shall not be entitled to any part of it.

(2) When some part of the legacy is destroyed or is taken away on account of the right of someone else, the legatee shall get his right to the extent of one-third of the remaining (heritable) estate wherein the destroyed part shall not be taken into account.

Section 244. (1) When the Will is in respect of (an undivided share in) some fixed category of legacy and it gets destroyed or the right of someone else is established over it, the legatee shall stand completely deprived.

(2) When, however, some part of it is destroyed, the legatee shall be entitled to get his right to the extent of one-third of the remaining estate.

Section 245. (1) When the Will is in respect of an undivided share in a specified property belonging to the legator and it gets destroyed or is lost (to the legatee) due to the right of someother person getting established over it, the legatee shall not be entitled to any thing.

(2) When some part of the said (share in the) Will is destroyed or is lost (to the legatee) due to the right of someother person getting established over it, the destroyed or lost part shall be considered not to be in existence from the beginning, and the Will shall be put into effect respecting the remaining property.¹¹⁰

¹¹⁰ *Qanūn al-Aḥwāl al-Shakhsiyyah*, Syria.

Iraqi Law :

In the Iraqi Law as well, there are almost the same provisions regarding the voidance of the Will as have been stated under the Syrian Law. The relevant provisions are as under: —

Section 72. A Will shall be void in the following circumstances:—

- (1) When the legator has revoked the Will, but the revocation shall be authentic when the proof of revocation is at par with the evidence required to prove a Will;
- (2) When the legator at the time of his death is devoid of his mental capabilities;
- (3) When the legator's disposition or deal in the legacy is such that it changes its name or its basic attributes;
- (4) When the legacy gets destroyed or is destroyed by the legator himself;
- (5) When the legacy is rejected by the legatee after the death of the legator.¹¹¹

Section 231. Denial of Will by the legator shall be deemed as revocation of the Will, provided that the circumstances so warrant.

Denial of
Will

COMMENTARY

When a person makes a Will regarding some of his properties, thereafter he revokes the Will, for instance, he says, "I have made no Will", in such a case there is difference of opinion among the jurists as to whether his denial shall be construed as revocation. According to Muhammad b. Hasan Al-Shaybani, this shall not be considered as revocation, whereas according to Abū Yūsuf it shall be considered as revocation of the Will. Imam Muhammad in support of his opinion argues that revocation presupposes the existence of a 'contract' and 'denial' implies its non-existence. The denial, in fact, is the negation of contract. If the denial, therefore, is held to be the revocation, it necessarily follows that the contract (of Will) be (first as if) in 'existence' and then as if in 'non-existence' both, which is an absurdity. As against this, Abū Yūsuf argues, "Denial is the negation of an act both in the past and the present and is a stronger term than the term of revocation,

¹¹¹*Qanūn al-Ahwāl al-Shakhsiyyah, Iraq.*

because the term 'revocation' indicates denial (of an act) merely in the present. Hence, holding 'denial' to be the revocation (as well) shall be preferable over revocation itself." The argument of Abū Yūsuf, from practical point of view, appears to be preferable and the same has been adopted by the present writer in framing this Section.

Indeed, the jurists are in agreement on the points that : (1) if some one says, "The house regarding which I had made a Will in favour of so and so, regarding the same house I now make a Will in favour of so and so, it shall be considered as his revocation of the Will; (2) As against this, when a Will is made at first in favour of one person and again a Will is made, respecting the same property, in favour of another person, in such a case both the first and the second legatees shall be considered to be co-sharers in the said legacy, in as much as the construction of the Will is capable of warranting their (the two legatees') partnership and the words of the legator as well are capable of such construction. But the question of partnership shall arise only when the other legatee is alive. If the other legatee is not alive and the legator is aware of the fact of his not being alive, the Will shall still be valid. The other legator was being made a co-sharer with the first legatee in the legacy, and as the right of the other legatee could not be got established, the original Will remained intact in its original implication.

In case of the above first-stated instance, if the other legatee is alive at the time of the making of the Will but, thereafter, before the death of the legator, dies, then both the Wills shall become void. The first one shall become void because the legator had revoked it, and the second one shall become void because the legatee was not alive. The estate shall then become the property of the heirs of the legator.¹¹²

¹¹²Zayd al-Abyāni; *Sharh al-Ahkam al-Shari'ah fil Ahwal al-Shakhsiyyah*, section 545.

CHAPTER XXIX

The Legator

Section 232. Subject to the conditions hereinafter mentioned,
Competency of legator any person, major and of sound mind, exercising control over his property and capable of passing property, at the time of making the Will, shall be competent to make a Will in respect thereof.

Exception :— A person approaching majority who has attained the age of discretion shall have the right of making a Will providing for his burial and virtuous acts.

COMMENTARY

Will is a covenant. There are several conditions laid down for its validity. Some of them are related to the legator and some are concerned with the legatee and the legacy. The conditions essential for the legator are that he, at the time of making the Will, must be major, discreet, free, independent and in control of his property. That is why a Will made by an insane person shall not be valid. Same is the case with minors. A person under coercion or extreme emotion also belongs to the same category, because the act (making a Will) is done by him without a positive intent on his part. That is why, when such a person under force or coercion enters into an agreement he has the right to annul the agreement after such force and coercion having been removed. Majority is an essential condition for making a Will. Therefore, a boy who has attained the age of discretion and is judicious may make a Will only regarding his burial and virtuous acts. This is an exception which is based on considerations conducive to general good.

Legal capability of parting with property—Hanafi View :

It is said in the noted Hanafi work on *fiqh* that at the time of making a Will, it is essential for the legator to be possessed of the capability of giving his property gratuitously. The Will made by a minor and a mad person shall not be valid because both of them are not possessed of the capacity of

giving their property gratuitously. According to Hanafis, therefore, if a minor referring his Will to the period of his adolescence says, "When I attain majority and then die, so much of my property be given to such and such person", it shall not be valid because the legator, at the time of his making the Will, did not legally possess such capability. It is also necessary for making a Will that it be made with intent, out of free will and desire. Hence, Will made under coercion, in jest or by mistake shall not be valid.¹

Zayd al-Abyāni states about conditions as regards the legator in his *Sharah al-Ahkam al-Shari'ah*: "The fact is quite obvious that as long as the two parties to the contract, (i.e. the promisor and the promisee) and the object of the contract are not present no contract can be brought into existence. The existence of some qualification in each of the said three components i.e. legator, legatee and legacy are essential for the transaction being brought into existence properly with all its requisites. There are, as well, several kinds of conditions attached to the 'transaction of Will'. Some of them concern the legator, some the legatee and some the legacy.

The basic condition for the legator is that he must possess the capacity of giving his property freely without consideration and that is possible when he is prudent, major, free and independent. A slave not being the owner of anything himself can not bestow ownership of anything on others. Likewise, the words of an insane person cannot be considered at their face value because the effectiveness of one's words depends upon his being judicious and an insane person lacks in discretion. Besides, in all such covenants that are made by way of favour, the age of majority is a necessary condition. As the child is possessed of no discretion himself, he, in connection with this matter, shall be at par an insane person. If he is deemed to be clothed with the power of discrimination a Will being a covenant that may involve injury to himself such dispensation even by a discreet child is not valid. The condition of being independent has been laid down because whatever an extremely agitated coerced person does, he does it without real intention or self will. That is why, the coerced and helpless person has got the right to annul the contract that is made by him in his compelled and helpless state, when such compulsion and helplessness are removed. The Will made by a child who is approaching the age of discretion (i.e. who has not yet attained the age of majority) shall also not be valid, whether or not he is permitted by his guardian to make such dispensation and whether the Will is absolute or is made conditional on his attaining the age of majority, for instance,

¹Al-Kāsāni: *Bada'i' al-Sana'i*, Cairo, vol. vii, p. 335.

he says that 'he makes a Will that on his attaining the age of majority one-third of his property be given to such and such person.' However, if a discreet child makes a Will for his funeral rites and ceremonies, it shall be valid.^{1a}

Malikis View :

According to Māliki *fiqh* as well, the one who makes a Will must be free, discreet and owner of the property bequeathed. Hence, the Will made by an insane person, by an indiscreet child, by a person not in his senses, by a drunkard in the state of his drunkenness, or by a person whose properties are attached under debts, shall not be valid. If, however, an un-intelligent child or so discreet a child in whose talks there are no contradictions, makes a Will regarding charitable matters, it shall be valid. The Will made by a non-believer shall also be valid, provided it pertains to property recognised by the Shari'ah as legal. Hence, Will made involving liquor or pork meat shall not be valid.^{1b}

Shafi'is View :

It is of basic importance for the legator that he possesses the legal right of controlling his property. Thus a person, who has the right of alienation by way of sale or gift, shall have the right of making a 'Will' as well.² But the persons who do not possess discretion and thereby do not have the right of alienation of property, for instance a mad man, the Will made by him shall not be valid because the validity of Will is based on the capacity of making a valid proposal and acceptance in a contract. The persons who do not possess the quality of discrimination, their words are not legally credible. If the person is a major but is a spendthrift (*musrif*) there are two views in respect of him : one is to the effect that the Will made by him shall not be valid because this being a covenant of disposition of property the utilisation by a spendthrift is not valid. The other view is that the Will made by

^{1a}Zayd al-Abyāni: *Sharh al-Aḥkām al-Shari'ah fil Ahwāl al-Shakhsiyyah*, Cairo, section 531.

^{1b}Al-Ābi: *Jawahar al-Aklīl*, Cairo, vol. ii, pp. 316-17, Ibn Rushd: *Bidayat ul-Mujtahid*, Cairo, vol. ii, p. 334, Zarqāni: *Muwṭṭa*, Cairo, vol. iv, pp. 470-71.

²Al-Shīrāzi: *Al-Muḥadḍḥab*, Cairo, vol. i, p. 456; Al-Shafi'i: *Kitāb al-Umm*, vol. iv, p. 90:

”وَمَنْ مَلَكَ التَّصَرُّفَ فِي مَالِهِ بِالْبَيْعِ وَالْهَبَةِ مَا كَانَتِ الْوَصِيَّةُ بِمِثْلِهِ فِي وَجْهِ الْبَرِّ -“

him shall be valid because he is barred, in view of the risk of the property going waste, from disposing of the property. The question of wastage of the property does not arise in Will. If the legator is alive, the property shall remain under his ownership; if he dies, he does desire nothing more except the attainment of future reward of the virtuous act and that desire shall be accomplished through the Will.³

Hanbalis View :

It is a condition for the legator, whether just or *fāsiq*, man or woman, Muslim or non-Muslim, that he must possess a sound mind and be major. Thus, a Will made by a man having discretion and wisdom shall be valid.⁴

A Will made by a person who is intoxicated, mad, drunk, unintelligent, child, or by a person who is struck with dumbness with no hope of recovery, shall not be valid. A Will created by a dumb person, however, through unmistakable sign, making its creation patently clear, shall be valid. The person whose intelligence is so feeble that its improvement is not expected shall be considered to be in the category of incapacitated person.⁵

Shi'ah View :

The legator, according to Shi'ah *fiqh* as well, must be free and discreet. Hence, a Will created by a mad man or by a child of less than ten years of age shall not be valid. Indeed, if he is even ten years old and possesses discretion enough to make prudent transactions, then making beneficial Will by him in favour of relatives or others shall be valid. This is a well known doctrine in Shi'ah *fiqh*. There is another report as well that the Will created at the age of eight years shall be valid. But it is a rare report.⁶ The legator, at any stage during his lifetime, may make a Will. The Will may either be regarding property or regarding guardianship.⁷ The legator's Will made after inflicting wounds on himself intending suicide shall be void. If the Will is, however, made before inflicting such injuries on his body it shall be valid.

The mother has no right of guardianship over her children. Hence, her making a Will for others to be their guardian shall not be valid. If the

³Al Shirazi : *Al-Muhaddhah*, Cairo, vol. iii, p. 457.

⁴Sharfud-Din al-Maqdisi : *Al-Inqā'*, Cairo, vol. iii, p. 47 :

” ويصح من البالغ الرشيد سواء كان عدلاً أو فاسقاً رجلاً أو امرأة ” مسلم أو كافراً “

⁵Ibid : Abu al-Barakat : *Al-Muharrar fil fiqh*, Cairo, vol. i, p. 476.

⁶Al-Hilli : *Sharā'i' al-Islam*, Beirut, p. 259.

⁷Ibid : p. 258.

mother makes a Will respecting her property in favour of her children and appoints someone as executor, for putting it into effect the transactions about the property by the executor shall be valid to the extent of one-third of the estate of the deceased. It shall, however, be valid that the executor also fulfils the obligations of the mother. But the guardianship of the executor (appointed by the mother) over the children shall not be valid.⁸

Zahiris View :

Unmarried and married women, inspite of their fathers and husbands being alive, may make Wills respecting their properties. The permission of their fathers or husbands is not necessary as God has laid down the law of Wills in general words that includes all individuals, man and woman. There is no disagreement on this point.⁹

Condition of being a Muslim :

It is no condition that the legator should be a Muslim. Muslims and *Dhimmis* (non-Muslim citizens of a Muslim State) are, therefore, qualified to make Wills. Likewise a non-Muslim who, after obtaining permission comes to live in a Muslim country, may make a Will, provided the Will is created in favour of a Muslim or a *Dhimmi*.¹⁰ If the legatee is domiciled in a nenemy country (*dār al-ḥarb*), the Will in his favour shall not be valid on the ground that it may later be of help to that country in the event of war (for further discussion an this point see Section 235 *infra*).

Age-limit of Majority :

The question of the age of majority in Indo-Pak sub-continent was settled in accordance with the provisions of Islamic Law upto 1874 but the legal age of majority under Majority Act, 1875 for making Will has been prescribed as 18 years. Further the minors, for whose persons or properties guardians have been appointed, or whose properties are under the care of Court of Wards, shall be considered, under the aforesaid Act, to be major when they attain the age of 21 years, whereas there exists no such limitation or exception under the Shari'ah. (For discussion on the age of majority under Islamic Shari'ah see p. 63 vol. i of this Code).

According to this writer, transaction in respect of property, in such a case too, may be allowed on attaining the age of eighteen years, which appears to be appropriate from public point of view, if there is no other impediment.

⁸Ibid : pp. 258-259.

⁹Ibn Ḥazm : *Al-Muḥalla*, Cairo, vol. vi, p. 399.

¹⁰Al-Kāsānī : *Bada'i' al-Ṣana'i'*, Cairo, vol. vii, p. 335; Al-Sarakhsī : *Al-Mabsūt*, Cairo, vol. xxvii, pp. 175-178.

Modern Legislation :*Egyptian Law :*

In Egyptian law of *Al-Wasiyyah* of 1946, it has been laid down as under :—

Section 5. Condition for a legator is that he should be legally capable of making beneficial disposal of property. If the legator, having been held incapable of making such disposal on ground of his being an idiot or negligent, is put under restraint by law or has not attained the age of eighteen solar years, the Will made by him shall be valid after its ratification by a competent court.

Syrian Law :

In the Syrian *Qanun al-Aḥwāl al-Shakhsiyyah* of 1953, Chapter on *Al-Wasiyyat*, it has been laid down as under :

Section 211. (1) It is a condition for the legator that he should be legally capable of making a Will.

(2) When the legator has been restrained from making transaction about his property because of his idiocy or negligence, the Will made by him shall be considered valid on ratification by the competent court.

Tunisian Law :

In the Tunisian *Majallatul Ahwal al-Shakhsiyyah*, *Qanun al-Wasiyyah* it is provided as under :—

Section 18 : Will made by an idiot person and a person of feeble mind and a minor of less than eighteen years of age shall be considered valid after its ratification by the competent court.

Section 233. A beneficial (charitable) Will made for noble deeds by a person who is restrained from making transactions because of his feeble-mindedness, shall be valid.

COMMENTARY

Generally the condition for the validity of a Will is that the legator must be free to enter into transactions and no restraint is placed upon him because of his feeble-mindedness. But the Will of an idiot person for charitable deeds shall be valid. This rule is based on *istihsān*. The *Qiyās* (analogical deduction), however, denies its validity. The reason based on *Qiyās*

is that making a Will is a form of transaction in respect of property and such transaction by an idiot person is not valid, inspite of the same having been made applicable after his death. As against this, the argument based on the rule of *istihsān* runs as this transaction of property by a feeble-minded person is restrained so that he may not waste all his property by plausibly charitable transactions and thereafter may become a burden upon society. This may happen when he is (without restraint) engaged in day to day utilisations during his lifetime. This cause (*illat*) is, however, eliminated in transactions effective after death through Will, because after death he is indifferent to property specially when the purpose of the Will is the proformance of charitable deeds that shall earn reward for him in the hereafter and shall as well be the means of appreciation in this world after his death.¹¹

Section 234. The person whose property is not submerged under debt and who has no heir, has the right of making Will in respect of the whole or a part of his property, in favour of any non-heir he chooses, without recourse to any authority.

Will of the pro-
perty not submer-
ged under debt

COMMENTARY

It is not always possible to say at the very inception of the Will, whether it can be implemented only to the extent of one-third or the entire property, because it entirely depends on the circumstances at the time of death of the legator. With the change in the circumstances of the legator, the legatee and the legacy the effect also changes.

The legator shall either be a debtor or not a debtor. His entire property shall either be submerged under debt or not submerged under it. The legatee in each of these cases may either be an heir or a stranger. The legator's heir may as well be alive at the time or may not. In all these circumstances the Will shall be effective respecting less than one-third or of one-third or more than one-third or the entire property. In each of the said circumstances, different results would follow suited to the occasion. If the legator is not at all a debtor and makes a Will respecting his entire property, having no heir alive, in favour of a stranger, the Will shall take effect with respect to his entire property. If the entire property of the legator is submerged under debt, the creditor shall be entitled to the entire property. If no Will is made and also there is no heir, whatever is left after the payment of debts shall be

¹¹Zayd al-Abyāni : *Sharh al-Ahkām al-Shari'ah*, Cairo, 1920, vol. ii, p. 213.

escheat to the government. If the entire property is submerged into the debt none will get anything. The legatee, however, when there is no heir and the entire property is willed in his favour, is better entitled to it than the Government.¹²

Section 235. Will made by a person whose entire property is submerged under debt shall not be valid unless the creditors remit their debts and are agreeable to the Will being put into effect.

Legator's power to Will in case of his estate being submerged under debt

COMMENTARY

If the debt due from the legator covers the whole of his property his Will, whether the legacy be either less or more than one-third, or whether in favour of an heir or a stranger, shall be incapable of implementation, because the creditors shall have their rights over the estate. But, if after payment of the debt some property is left over the Will shall be put into effect to the extent of one-third of the property left over provided the Will is in favour of non-heir.¹³ Allah has given precedence to debt over the Will.¹⁴

Modern Legislation :

Egyptian Law :

Under the Egyptian law of Al-Wasiyyah of 1946, it is provided that in the event of the legacy being submerged under debt the following provisions of law will apply :—

Section 38. A Will of the legator whose entire estate is covered by debt shall be valid, but it shall not be put into effect until it becomes free from debt. If it becomes free from debt or the entire property does not happen to be covered by the debt, the Will shall be put into effect respecting the property left over after payment of the debt, (to the extent of one-third) of the remainder.

Section 39. When the entire estate of the legator is not covered by debt and the debt is paid off from a part of the legacy the legatee shall be considered to be entitled to the legacy left over after the payment of the debt (to the extent of its one-third).

¹²Ibid.: p. 275.

¹³Ibid.: p. 276.

¹⁴Al-Kāsāni: *Bada'i' al-Sana'i'*, Cairo, vol. vii, pp. 335-43; 'Abdullah Ibn Mahmūd: *Al-Ikhtiyār li ta'til al-Mukhtār*, Cairo, 1951, vol. iv, p. 63.

Section 40. When a Will is made of undivided share of a kind of property from the properties belonging to the deceased and that kind of property gets wasted or an adverse claim is established over it, the legatee shall get nothing out of it. If some part of that kind of property gets wasted or a claim of someone else is established over it, the legatee shall get his share from what is left over if it is to the extent of one-third of the estate. If what is left over is more than one-third he shall get only to the extent of one-third.

If a Will is made in respect of an undivided number of a kind of property (counted in numbers) from properties belonging to the legator, the same rule, as has been stated above regarding the undivided share, shall apply.

Section 43. When the Will is in respect of money or of a specified object and the estate is covered by debt or some portion of it gets destroyed, only one-third of the remainder shall be given effect to under the Will. If the legacy can be made up to the extent of one-third of the estate from what is left over it shall be so made up, otherwise it shall be the one-third of what is left over. Whenever some further property of the legacy shall turn up, the legatee shall be entitled to it until the quantum of the legacy is completed.

Section 44. When the Will is regarding the undivided share in the estate and the estate is covered by debt or some portion of it is untraceable, the legatee shall be entitled to his share from the property that is in existence. Whatever is continued to be recovered thereafter he shall continue to be entitled to the extent of his share therein.

Section 45. When the Will is made of a kind of property of the estate and it is an undivided share and the estate is covered by debt or the property is untraceable, the legatee shall be entitled to his share from the same kind of existing property, if his share to the extent of one-third can entirely be taken from the existing property. If not, it may be taken merely to the extent of one-third from whatever property of that kind is then available. The heirs shall be entitled to the rest of it. The legatee shall be entitled to one-third of whatever quantum of that property is obtained later, provided the completion of the legatee's share from that property does not affect the rights of the heirs. If the heirs suffer loss by giving the specified property the legatee shall have the right of realising out of the price of that property in proportion to his share. In this manner he shall obtain his full right.

Section 46. In all those circumstances that have been stated under the foregoing sections, if the payment of the debt of the legator becomes the liability of one of the heirs of the legator, and the debt is of the kind of the existing estate, a comparison shall be made in payment of the debts in accordance with the share of that heir and his share shall be considered to be the existing property. If the debt is not of the kind of the share in property of the said heir, it shall not, then, be compared with the share of the heir. The payment of the debt on the property existing shall (of the same kind), however, be taken into consideration when share in debt be either equal to or less than the existing property of the heir. If the debt is more than the said quantity it shall be relied upon merely to the extent which is in accord with the quantum of the existing property.

In the circumstance, the heir shall not be able to take possession of the existing property in accordance with his share except when he pays off the debt of the legator. If he does not pay off the debt (concerned), the official (of the Court) shall get it sold and pay off the debt from its sale proceeds.

Section 47. When a Will is made regarding a particular object from the legator's property or a Will of particular kind of property is made out of the various kinds of the legator's properties and that object or that kind gets destroyed or a right of someone else gets established over it, the legatee shall not be entitled to anything. If some part of that object or of that kind is destroyed or the right of someone else getting established over it is otherwise satisfied, the legatee shall be entitled to the extent of one-third (of the estate), otherwise he shall be held entitled to the extent of one-third (of the remainder).

Section 48. If there is a Will regarding an undivided share in any fixed kind of estate and that kind of estate gets destroyed or a right of someone else gets established over it, the legatee shall get nothing. In case some part of that fixed kind of estate gets destroyed or a right of someone else gets established over it, if the estate remaining completes the right of the legatee and comes within the limit of one-third of the estate the legatee shall be entitled to the whole of it, otherwise he shall be entitled to the extent of one-third (of the remainder) only.

Syrian Law :

The relevant provisions of law regarding Wills as found in the *Qanun al-Ahwal al-Shakhsiyyah*, 1953, Chapter on Wills are given below :—

Section 239. When the estate of the deceased is not covered by debt, and it has been paid off from the entire or some part of the legacy, the legatee shall be entitled to get his share to the extent of one-third from the estate left over.

Section 240. The putting into effect of a Will made in favour of some person for the sale or for giving on lease of a property on a reduced consideration which reduction exceeds the limit of the consideration of one-third of the estate, shall depend upon the consent of the heirs when the legatee is not prepared to forego the said consideration exceeding one-third.

Section 241. When the Will pertains to a fixed amount or is for a specified property and the estate is under debt or some part of the estate is missing, if the amount of the legacy is held to be equal to the one-third of the property available, the legatee shall be entitled to get that amount. If it is held to be more than one-third, the legatee shall be entitled to its one-third and the remaining of it shall go to the heirs. In future, whatever property of the deceased becomes available the legatee shall go on getting his share to the extent of one-third of it all, till he gets what he is entitled to.

Section 242. (1) When the Will pertains to an undivided share of the estate of the deceased and the estate is under a debt or some part of it is missing, the legatee shall then secure his right from the property available. Thereafter, whatever property shall be available, the legatee shall go on getting his share therefrom.

(2) When some property forming the estate is a debt against an heir of the legator, which it is necessary to be recovered from him, and if there is a property of the same kind in the estate as that outstanding with the heir, fixing the heir's share in the matching property of the heir shall be allocated and the estate shall be considered to be available, as to the said debt.

(3) If the property of the same kind under debt which is necessary to be discharged by the heir does not exist in the estate available, recovery by setting off will be impossible. Rather the share of the heir in the estate shall be withheld so that the debt may be realised from it. And the debt regarding that share shall be considered to have been paid up and the same shall be in the nature of the property available and open as estate of the deceased.

In case of set off cash and currency notes shall be considered to be of the same species.

Section 236. Difference of faith and religious beliefs shall be no impediment to the making of Will. The Will of a Muslim in favour of a non-Muslim, either a permanent or a non-permanent citizen of Islamic country, and the Will of a non-Muslim in favour of a Muslim shall be valid. The Will of a Muslim in favour of a non-Muslim of enemy country (Dar al-Harb), indeed, shall be void when the legator's country is at war with the enemy country or when a state of war exists between the two countries.

COMMENTARY

A Muslim, according to Hanafi jurists, can make a Will in favour of a non-Muslim permanent citizen of an Islamic country. Likewise, a non-Muslim permanent citizen of an Islamic country can make a Will in favour of a Muslim. This finds support in the book of God, "Allah forbids you not, with regard to those who fight you not for (your) faith, nor drive you out of your houses, from dealing kindly and justly with them; for Allah loveth those who are just."¹⁵ This verse, according to Hanafi Jurists is a textual order directing to be kind and generous towards non-Muslim permanent residents of an Islamic country. As 'behaving well and acting kindly' can be practised in life, so it can be practised after death.¹⁶ Hence, 'behaving well and acting kindly' through Will made in favour of a non-Muslim resident of Islamic country shall be valid. Likewise a Will made by a non-Muslim resident of Islamic country in favour of a Muslim shall be valid. It may also be inferred from this text that a Will made in favour of a non-Muslim belonging to the enemy country shall not be valid in as much as the condition is "fight you not in the matter of faith". According to this writer, the "enemy country" may, in the context of a Will be better interpreted where country is engaged with or is prepared to engage in war against the Islamic country or there does exist a state of war between the two countries. In view of the recent terminology of warfare, this principle may also be applied in case of the 'cold war' as well, wherein the two countries by means of propaganda and ideological confrontation maintain a state of war against each other.

¹⁵ *Al-Qur'ān Surah Al-Muntahinah*, (The Woman to be Examined) LX: 8,
 "لا ينهاكم الله عن الذين لم يقاتلوكم في الدين و لم يخرجواكم من دياركم
 ان تبروهم و تقسطوا اليهم ان الله يحب المحسنين"

¹⁶ *Al-Marghinānī : Al-Hidāyah*, Karachi, vol. iv, p. 657.

From the above discussion it can easily be concluded that for the validity of a Will unity of faith and religious belief is not necessary. For this reason a Will made by a Muslim in favour of a non-Muslim has been held to be valid. A condition in such a Will, however, is that the non-Muslim should either be the permanent citizen of Islamic country or be staying there temporarily with the permission of the Islamic country. If the non-Muslim belongs to an enemy country the Will in his favour shall not be valid, because by its being put into effect aid in a war may possibly follow. It is stated in the Qur'an, "Allah only forbids you with regard to those who fight with you (for) your faith and drive you out of your homes and support (others) in driving you out, from turning to them (for friendship and protection). It is such a turn to them (in these circumstances) that do wrong."¹⁷

As the Will of a Muslim in favour of a non-Muslim is valid, so is the Will of a non-Muslim in favour of a Muslim or a non-Muslim is valid. Hence, the Will of a non-Muslim residing temporarily (with permission) and of a non-Muslim (a permanent citizen) in favour of a Muslim is valid. If a non-Muslim residing temporarily makes a Will regarding his entire property in favour of a Muslim when no heir of his is alive this Will shall take due effect. If an heir is, however, alive the Will shall take effect to the extent of one-third. In case of it being of more than one-third it shall be necessary to obtain consent of the heir.¹⁸

Maliki Practice :

Will made in favour of a non-Muslim citizen of an Islamic country regarding property of which he may, in Shari'ah, be held to be the owner is valid. Will regarding things of which he, under Shari'ah, cannot be held to be the owner, for instance, the Will of liquor and other sinful objects shall not be valid.¹⁹

Shafi'i Practice :

The Shafi'i jurists have adopted the word "*adam qurbat*" (absence of nearness to God) instead of the word "*ma'siyat*" (sin). That is to say,

¹⁷Al-Qur'ān : Surah *Al-Mumtahinah*, 9.

"انما ينهأكم عن الذين قاتلواكم فى الدين و آخر جواكم من دياركم و ظاهر و اعلأ اخراجكم أن تولوهم "

¹⁸Al-Marghināni : *Al-Hidayah*, Karachi, vol. iv, p. 657; Ibn Nujaym: *Al-Bahr al-Ra'iq*, Cairo, vol. viii, p. 456.

¹⁹Al-Ābi : *Jawahar al-Aklīl*, Cairo, vol. ii, p. 318.

Will regarding acts that are not the means of getting favour of God shall not be valid. Hence, a Will by Muslim, on the basis of a wider connotation of the word in favour of churches, cathedral, temples etc. is not valid. Likewise, a Will created for supply of arms to non-Muslims who are at war with Muslims is not valid.²⁰

Hanbali Practice :

According to Hanbalis, as with Imams Malik, al-Shafi'i and Ibn Hanbal, as a Will in favour of a non-Muslim (*Dhimmi*) is valid, so it is valid in favour of one belonging to enemy country (*dār al-harb*).²¹ According to this writer, the Hanafi rule on this question, in the light of the Qur'anic commandment, appears to be more just and is preferable.

Shi'ah Practice :

The Shi'ahs hold two views regarding a Will made by a Muslim in favour of a non-Muslim. One is that the Will is valid and according to the other view the Will is not valid. The first view appears to be correct, but according to it as well the Will in favour of a non-Muslim belonging to enemy country shall not be valid.²²

Zahiri Practice :

Zahiriyyah too, on this question, are in agreement with other Imams that a Will made in favour of a non-Muslim citizen of an Islamic country is valid.²³

Modern Legislation :

Egyptian Law : A Will inspite of difference of faith and religious belief, shall be valid. Similarly a Will shall be valid, in case of difference between two countries, as long as the legator is not subject to a non-Muslim country, and the legatee is not such a non-Muslim who is subject to such a non-Muslim country, where the Will of such a legator is not valid.²⁴

Section 237. All the charitable disposal (alienation or appropriation) of property made by a person in his death-illness shall be put into effect as a Will to

²⁰Al-Shirazi : *Al-Muḥadḍḥab*, Cairo, vol. i, p. 458.

²¹Al-Shi'rani : *Al-Mizān al-Kubrā*, Cairo, vol. ii, p. 106.

²²Al-Hlli : *Shara'i' al-Islam*, Beirut, p. 262.

²³Ibn Ḥazm : *Al-Muḥattā*, Cairo, vol. vi, p. 393.

²⁴*Qanūn al-Wsiyyat*, Cairo, 1946, section 9.

the extent of one-third of the remaining estate after payments of debts.

COMMENTARY

So far as the disposal of property by means of a Will is concerned, the persons making it fall under two categories as below :—

1. Those of sound mind and health.
2. Those suffering from death-illness.

In the matter of dealing with their property by each of the two above-stated types of persons there are different provisions of law applicable to each case. Keeping this in view, their transactions about properties may be divided into two kinds :

1. Transactions of properties having immediate effect.
2. Transactions of properties to take effect after death.

The transactions immediate are in the nature of creating or taking effect at once, for instance, gift, sale or waqf. After the use of such terms their effects and purposes get implemented at once with passing of ownership of property; or the transaction in the nature of affirming a past deal (*akhbari*). That is to say, it declares factual ratification in connection with the existence in the past of some transaction, for instance making an acknowledgement of a debt which was contracted in the past. If the transaction is immediate the condition of one who initiates the transaction has to be considered. He may be of sound mind and as such he may either be a free agent or legally restrained (either he makes transactions freely or he can not do so; rather restrictions must have been placed by some court over his transactions and dealings with his property). If the legator is healthy and not under restraint all his transactions shall be put into effect covering his entire property whether they be *insha'ī* or *akhbārī*, whether they be in favour of an heir or non-heir, whether they be with consideration or without consideration or there be deduced from his transactions the idea of favour as sale at the immensely low or purchase at an extra-ordinary high price or making gift and offerings in whatever amount or in favour of whomsoever he likes. No one shall have the right of questioning his such transactions.

If the one who appropriates his property is of sound mind and healthy but restrictions are placed over his dealing with property, different effects shall follow his transactions in view of the restrictions placed on him. The

different grounds for the restrictions placed on appropriation of property that have been stated in the books of *fiqh* include minority, insanity, lunacy, stupidity and insolvency. But the appropriation that refers to be effective at a time after death shall take effect to the extent of one-third of his entire property left behind him, although it might have been made in the state of good health because the referring the transactions or appropriations to a time after death is a Will. For instance, a person says "I make a gift of half of my property to so and so after my death", or says, "I Will it to so and so". This transaction shall take effect to the extent of one-third of his property only, though he may have done so in the state of sound health or in the course of his death-sickness. It may not, in certain circumstances, take effect merely to the extent of one-third of the property. It may, in certain circumstances, take effect to the extent of the entire property and in certain circumstances it may not take effect at all. This is so because the circumstances of the legator and the legatee (in each case) may vary and the difference of situation between them may affect the property. If the one who appropriates is suffering with death-sickness the law lays down restrictions on his disposition of property. These restrictions on the disposition made by the persons suffering from death-sickness is with a view to protect the interests of his heirs. If the person suffering from death-sickness makes some such dispositions that are to be put into effect at once such as gift, Waqf, or sale at a price considerably lower than its market value, the provisions of the law of Will shall apply to such transactions to the extent of such reduction in price. If, however, the sick person sells his property at a proper price, such a sale shall not thereby be affected.

If there is a disabling cause other than the death-sickness, such as minority, insanity, lack of descretion or that one's estate is completely encumbered or that one is forbidden to make dispositions of his property under the orders of a court, in such events, the dispositions shall, with certain exceptions, be void.

If a person, who is overtaken by death-sickness, makes an immediate disposition of property in the nature of *inshā'ī* as gift, waqf or sale etc. all these dispositions shall come under the purview of a Will. The characteristics of the dispositions shall, however, be taken into consideration. The disposition shall, sometimes, be found to be based purely on favour or charity as a gift (or a Waqf) and sometimes shall convey therein an intention of compensation. The words may also convey the intention of gratuitous givings such as selling a thing on extremely low price or buying a thing on extremely high price.

In the first case i.e. if a person, in his death-sickness, makes a gift of his property in favour of another person, the legal position of the donor, donee and the thing donated shall have to be duly considered in the same way as the position of the legator and the legatee in case of a Will. Hence the case shall necessarily fall under any of the following categories :—

The donor, suffering from death-sickness, shall either be a debtor or not a debtor. If he is a debtor his property shall either be covered or not covered by debts. In each of the two conditions the donee shall either be his heir or a stranger. Further, other heirs of the donor shall either be in existence or not in existence. In all these events, the property donated shall either be less than, equal to, or more than one-third of the estate. In each of these cases the legal consequences shall follow which are elucidated as under :—

1. If there is altogether no debt against the donor and the donee is a stranger and the donor has no heir existing, the entire gift shall take effect to the extent of the entire estate and no one, even the State shall have the right of objecting to it. The reason is that the donee in that situation shall be in the category of legatee and the legatee has priority over State respecting his rights. Indeed, if the gift, in the same situation, is in respect of only a part of the estate, the remaining part shall belong to the State when there is no heir of the deceased.

2. If the donor is in debt and the debt is equal to his entire estate, (for instance, at the time of his death, he owes rupees four thousand and valuation of his property also amounts to rupees four thousand) the Will of whatever quantum it may be, can in no way be put into effect, whether the legatee be a stranger or an heir. However, if the creditors so permit, it may, after obtaining permission, be put into effect, even to the extent of entire estate. In such event, permission of the heirs shall not be required, because in such a case no right of the heirs is involved at all.

3. If the donor is in debt but the debt does not cover his entire estate, for instance, at the time of his death, the debts he owes to others amount to rupees two thousand and the value of his estate is rupees four thousand, in such a case the amount of the debt shall at first be paid off from the proceeds of the estate. Thereafter the law of a legacy, free from debt, shall be applied on the portion of the estate remaining unencumbered. That is to say, it shall be applied to the extent of one-third, provided the legator has left a heir too.

4. If the legator is not a debtor and the Will is made by him in favour of his heir and besides that heir there are other heirs as well, the Will shall not take effect without the permission of other heirs, whatever may be the quantum of the Will, because in such a case it amounts to giving preference to one of the heirs over some other heirs. If the rights of the latter are not preserved it shall amount to repudiation of relationship which the law forbids. For a valid 'permission' it is necessary that the person giving permission be fully qualified to dispose of his property. Hence, the permission of a person disqualified on the ground of his being a child, insane, mad or not having discretion shall be invalid because none of them is capable of passing property. Further, the legatee's position of being an heir or not shall be determined at the time of the death of the legator, not at the time the Will was made.

5. If the legator is not in debt, his heirs are present and the legatee is a stranger i.e. he is not an heir of the legator at the time of his death, and the thing bequeathed is not more than one-third of the estate, the Will shall be put into effect and the permission of the heirs shall not be necessary. If it is more than one-third, the validity of the excess quantity shall depend on the permission of the heirs. If such permission is given the excess quantum shall be effected, otherwise it shall not take effect. The bar on the excess in the Will is on the basis of the rights of the heirs. If, however, they themselves give up their right, Will shall be fully implemented.²⁵

Maliki View :

According to Mālikis the enforcement of a Will of more than one-third shall depend upon the permission of the heirs.

According to them a pregnant woman, in the early period of her pregnancy, shall be treated to be in the category of a woman enjoying good health. She shall not be considered to be subject to death-sickness, but she, in the later period of her pregnancy, shall be considered as if subject to death-sickness.²⁶ Al-Zarqani in support of the opinion of Imam Malik, says in his *Shrah al-Muwatta* that the early period of pregnancy of a woman upto six months is the period of happy expectation. God has said, بِشَرِّ نَاسٍ هَآ بِأَسْحَقٍ وَوَرَاءَ أَسْحَقٍ يَعْقُوبُ. The early period of pregnancy has been held to be of expectant happiness. It shall not be held to be sickness. When

²⁵Zayd al-Abyani : *Sharh al-Ahkām al-Shari'ah*, Cairo, 1920, vol. ii, pp. 318-327.

²⁶Al-Ābi : *Jawāhar al-Aklil*, Cairo, vol. ii, p. 321.

the child in womb reaches the stage of being born, the Qur'an says, "فلما اثقلت دعوائه ربهما" i.e. "When the woman is burdened they both called God (for help)." Hence, when the woman begins to feel pregnancy as a burden she cannot, till the child is delivered, bequeath more than one-third of her property.²⁷

This opinion of Imam Malik does not appear, to this writer, to be absolutely correct. Firstly, the pregnancy is physically a natural process. Secondly, the period of pregnancy, whether it is of the early stage or is of the later stage, cannot be interpreted to be the period of sickness, unless the woman during her pregnancy is struck down with sickness that may prove to be death-sickness. According to this writer, only the period just before the delivery during which a woman starts suffering pangs of child-birth, may under law, be held to be a period of death-sickness.

Shafi'i View :

The diseases that put man in dread of death are called 'death-sicknesses' or 'dreaded diseases' such as plague, colic-pneumonia, chronic nose haemorrhage, chronic diarrhoea or consumption in the last stage, or serious paralysis, or galloping tuberculosis. Such diseases generally end in death. Other ordinary diseases are not classed as dreaded diseases, such as itches, toothach, headache, ordinary malaria, fever, bloody stools, ordinary consumption and protracted paralysis. All these diseases are curable. There is no risk of death in them. There is greater possibility of recovery than death.²⁸

There is, however, difference of opinion with respect to a person who is on a battlefield, or is in the midst of a sea storm, or is a prisoner of such infidels who are sure to put the prisoner to death, or has been brought to be stoned for committing adultery, or is in active combat in the war. One opinion is that it shall be at par with death-sickness and the disposition of property made by one (in such state) shall take effect to the extent of one-third. The other view is that the person in such a state shall be taken to be enjoying sound health. Regarding the assassin who is brought before the gallows for being executed, there are two verdicts : one is to the effect that his body as long as it is not hurt he shall be considered to be in the category of a person enjoying sound health and his disposition of the entire property shall be valid. This view among the Shafi'is is taken to be based on a

²⁷Zarqani : *Sharh Muṭṭā*, Cairo, vol. iv, p. 480.

²⁸Al-Shafi'i : *Kitab al 'Umm*, Cairo, vol. iv, p. 107; Al-Shirazi : *Al-Muḥadḍḥab*, Cairo, vol. i, p. 436.

textual authority. The 'Ulama of the later period, on such occasion, have adopted two opinions. Abu Ishaq has said that he is like that prisoner who falls into the hands of infidels who do not leave a prisoner without killing him. And the other view is that he shall be taken to be in the category of a person enjoying sound health and the limit of one-third shall not apply to his disposition of the property.²⁹

According to this writer, limitations that have been placed on the disposition of the property during 'death-sickness' are not merely applicable in case of 'death-sickness' but are also applicable in all circumstances where imminent danger of death is present.

Hanbali View :

All the gratuitous dispositions of property, such as gifts etc. including the making of Wills exceeding a third of the legator's property, by a person in his death-sickness are not valid, nor they shall be valid where made in favour of heirs. There are two opinions reported from Imam Ibn Hanbal : One is to the effect that such a Will shall take effect respecting the entire property. If the disease is such that one suffering from it remains alive for a long period, for instance, consumption and leprosy. The other is to the effect that Will shall take effect to the extent of one-third of the property. A woman with a pregnancy of six months shall be considered to be in the category of one suffering from death-sickness. The person in the battle-field or who is on a ship in stormy sea or who is brought before the gallows for being executed or is at a place where plague is raging, according to one view, such persons shall be in the category of those who suffer from death-sickness, and according to another, they shall be in the category of persons enjoying sound health.³⁰ But, to this writer, the first view is preferable because the basic cause is the dread of death which is present in all these circumstances as well. In case of pregnancy, however, this rule may apply when the woman starts suffering from the pangs of child-birth.

According to Hanbalis the diseases such as heart attack, leverache, pneumonia, plague whether raging in one's city, or one himself is suffering from it, chronic diarrhoea, colic, consumption, chronic nose-bleeding, continuous purging, paralysis in the initial stages, last stages of ulceration of lungs or the disease held by two physicians of integrity as 'death-sickness', are classed as death-illness.³¹

²⁹Ibid, p. 108.

³⁰Abul Barkat : *Al-Muharrar*, Cairo, vol. i, pp. 377-78.

³¹Sharfuddin Al-Maqdisi : *Al-Iqnā'*, Cairo, vol. iii, p. 140.

Shi'ah Fiqh :

Disposition of property made by a sick person has been classified under Shi'ah *fiqh* to be of two kinds :—

1. Deferred.
2. Prompt.

There is a consensus of opinion on the point that deferred disposition shall be regulated by the law of Wills just like the disposition of a healthy person relating to his property to be made effective after his death.

Regarding prompt dispositions as giving remissions, making gifts, creating waqfs, there are two opinions on record : the first is that it shall be put into effect from the entire estate; the second is that it shall be put into effect out of one-third of the estate only. However, the Shi'ah jurists agree on the point that if the sick person recovers from his illness, prompt dispositions made by him shall be considered to have taken effect irrespective of the attitude of his heirs. The difference of opinion arises only when the sick person dies in that particular illness.³²

Sickness Defined :

It seems necessary here to discuss in some detail the diseases on the basis of which, according to the Shi'ah jurists, the dispositions made by a sick person may be given effect to regarding one-third of the property only. The sickness on account of which death generally occurs is called 'death-sickness'. For example, consumption, ulceration of lungs or continuous-haemorrhages, cedema, chronic hepatitis and serious lung diseases or fatal diseases of the like nature. The sickness from which the possibility of recovery is stronger than death is considered at par with state of health such as fever, headache, asthma, swelling of the eyes etc. However some sicknesses are such that fall under a category midway between the two such as typhoid fever, dysentery, etc.

According to this writer, these days when the science of medicine has tremendously advanced regard should be had to the condition of the patient. The limitations that have been placed on the disposition of property during 'death-sickness' can also be applied, according to this writer, in some such circumstances which may have no concern with any sickness but the possibility of the occurrence of death, because of them, is as great as in death-

³²Al-Hilli : *Shara'i' al-Islām*, Beirut, p. 267.

sickness. Thus, the disposition of property in the battle-field while a war is on or in the sea during a storm should be considered to be in the category of disposition made in 'death-sickness'. Here, though there is no question of 'sickness' the rule shall be applied in accordance with the cause ('illat') which, in similar cases, is the same, viz. the presence of 'the dread of immediate death'.

Zahiri View :

According to Zahiris, property dispositions by or on behalf of the person who is involved in death-sickness or is imprisoned to be beheaded or is a woman in (late) pregnancy or by a person on some sort of travel as gift, propitiatory offerings, remissions in sale, making Wills, shall be given 'effect to' as the acts of a sound and healthy person.³³ (For further elaboration of this point of view please refer to Vol. i, pp. 377-78).

Section 238. If the wife of a husband suffering from death-sickness demands an irrevocable divorce from her husband during his sickness, and the husband divorces her, and thereafter the husband acknowledges her debt or makes a Will in her favour, and then dies during her observance of the term of probation, she shall get the smaller quantum viz., either the inheritance or the acknowledged debt or the legacy (to the extent of one-third) of the property of the deceased. If the husband dies after her completing the term of probation, she shall get either the acknowledged debt or the property under legacy (to the extent of one-third) as the case may be. If the divorce has been effected without a demand made by the wife, she shall get her complete share in the inheritance in the event of her husband's death during her observance of the term of probation.

COMMENTARY

Any acknowledgement of debt of the wife and the making of Will in her favour during her observance of the term of probation after divorce by the husband during his 'death-sickness' is included in appropriations of property made by a sick person during his death-sickness in which the

³³ Ibn Hazm : *Al-Muḥallō*, Cairo, vol. vi, pp. 425-38.

jurists have in view the interest of the heirs. If a person in his 'death-sickness' effects irrevocable divorce to his wife and thereafter he acknowledges her debt due to her, or makes a Will of his property in her favour, and then dies in that sickness, the Muslim jurists say, that circumstances then existing shall have to be taken into account to determine, whether the husband pronounced the divorce on the demand of the wife or pronounced it without her demand. If the divorce is pronounced on the demand of the wife and the husband dies before she completes her term of probation in such event she shall be given her share either in the inheritance or the acknowledged debt or the property under Will, whichever is less. The reason for this is the partiality which, in that circumstance, may be attributable against the husband, that he, on the ground of the wife being divorced, may have intended that the wife may get a little more share in his property compared to her share in the inheritance. The probability might be that they may have secretly agreed that the husband acknowledges so much debt of the wife, or makes a Will in her favour, and the wife then making a demand secures irrevocable divorce from him so that she unfairly gets the acknowledged debt or the property under Will, whichever be more than her share, out of the estate. Hence, with a view to nullify this attributable illegal intention and to safeguard the interest of the heirs she shall be given out of those dispositions the lesser in quantum. It shall not then be possible to level any kind of accusation against the husband, and she shall not get share as in inheritance; rather she shall get the share under the covenant of Will. That is why the wife shall not be considered as sharer with the heirs. If the sick person dies after the completion of her term of probation she shall, in that event, get the acknowledged debt or the property according to the Will (with the condition of one-third applicable to the legacy). The wife in such a case is treated as a stranger to her husband, and so no question of her share in the property left by the deceased shall arise.

If the sick person, without demand by the wife, pronounces irrevocable divorce to her and dies during her observance of the term of probation, she shall get her complete share of inheritance in the estate, whatever may be its quantum. It shall be so because, in the circumstance, it shall be presumed that the husband wanted to deprive his wife from getting her legitimate share in the estate. This illegal intention of his shall be thwarted and the woman shall be held to be an heir. If the husband dies after the completion of her term of probation, she shall get the acknowledged debt or the legacy under

Will, if any, whichever is less, in as much as the relationship i.e. the basis of inheritance then stood terminated.³⁴

(For the complete details of the incidents of divorce by persons suffering from death-illness please see Section 112 "Divorce pronounced in death-sickness" Vol. i, pp. 372-379 *supra*).

³⁴Zayd al-Abyāni : *Sharḥ al-Aḥkām al-Sharī'ah*, Cairo, 1920, vol. ii, p. 335.

CHAPTER XXX

The Legatee

Section 239. (1) It is essential for the validity of a Will that the legatee must in fact or in law be alive at the time of the death of the legator and be capable of receiving the legacy. If the legatee dies before the legator, the Will shall become void and the rights of the heirs of the legator shall get created in the legacy, except when the legator intended otherwise.

(2) If a Will, without any condition, is in favour of only two persons and of these named persons one is already dead at the time of making of the Will or is not even born, the other legatee shall be entitled to the entire legacy, provided he is alive at the time of the death of the legator. If the other legatee though alive at the time of the making of Will, dies during the life of the legator, the heirs of the legator and not the heirs of the deceased legatee, nor the other living legatee, shall be entitled to the part of the legacy under the Will made in favour of the deceased.

(3) If a Will is made jointly in favour of two persons and after the death of the legator it transpires that one of them is the heir of the legator whereby he is not entitled to any legacy under the Will, his share shall then not be given to the other legatee and all the heirs of the legator shall be held entitled to that share. The same shall be the case where out of the joint legatees one is held guilty of the murder of the legator, or because of some other reasons becomes legally incapable and disentitled to get the legacy under the Will.

(4) When a legator makes a Will in favour of two such specified legatees out of whom one legatee is dead or is non-existent at the time of the making of Will, such legatee (or any

heir of such legatee) shall not be entitled to any legacy under that Will. If both of them are alive at the time of the making of Will and thereafter one of them, prior to the death of the legator, either dies or becomes incapable of receiving legacy under that Will, the Will in his favour shall become void.

COMMENTARY

Hanafi Practice :

Under the Hanafi *fiqh*, the existence of the legatee is essential for the validity of Will. If the legatee is not alive the Will shall not be valid because a Will made in favour of a non-existing legatee is not valid. On this principle a Will made in favour of a child in the womb is valid. In case there is no pregnancy the Will is not valid. The proof of the existence of pregnancy at the time of the making of Will is that the child is delivered within a period of less than six months from the time of the death of the legator. Another view is that the child is delivered within a period of less than six months from the time of the making of Will. The first view is based on the *Zāhir al-riwāyat*.

It is essential for the legatee to be alive at the time of the death of the legator. Consequently, in case of a Will made in favour of a 'child in the womb,' if the child is born dead the Will in its favour shall not take effect, because a Will in favour of a dead body is invalid in the same way as it is incapable and unfit in the matter of inheritance.

It is also essential that the legatee should not be an heir of the legator at the time of legator's death. If the legatee is not an heir at the time of the making of Will but becomes an heir at the time of the death of the legator, still the Will shall not take effect in favour of the legatee because the relevant condition of his not being an heir shall be taken into consideration with reference to the time of the death of the legator and not to the time of the making of Will. Thus, if a person makes a Will in favour of his brother at the time when his own son is alive and thereafter the son dies and later the father also dies, the Will in favour of the brother shall not remain valid because at the time of its taking effect the brother has become an heir of the legator, though at the time of the making of Will he was not an heir. As against this, if there is no son to the legator at the time of his making the Will in favour of his brother but son is born to him prior to his death, the Will in favour of the brother shall be valid because he is no longer an heir. In any case a Will in favour of an heir shall be valid if the other heirs agree

to the Will being implemented because it is rendered invalid only on account of their rights attached to the legacy and they are entitled to forego their rights any time they like.

It is imperative that the legatee should be a known one. He should not be so unknown that his identification be not possible. Indeed, if some such attribute is stated from which somehow his identity can be possibly established, the Will in his favour shall be valid. If it is declared "one-third of my property shall go to Muslim destitute" the Will shall be valid because the attribute of destitute is enough for establishing the identity of legatees. If it is said, "one-third of my property shall go to the Muslims" the Will shall be void because of uncertainty.¹

One of the conditions stated in the books of *fiqh* in connection with the legatee is that a non-Muslim legatee should not be the domicile of the country of non-believers.^{1a}

Existence—a condition for particular legatee :

Zayd al-Abyāni has in his book, "*Shraḥ al-Ahkam al-Shar'iyyah*" written that a condition for the legatee is that he should be alive at the time of the making of Will, whether he be alive in fact, or in the eyes of law, as is assumed in the case of pregnancy. This is so because a Will is, in certain conditions, valid in favour of one in the womb. Apparently the condition of being alive applies to the case where the Will is made in favour of particular person. For instance, it is said that the Will is made in favour of so and so son of so and so and there in fact is no son of so and so of that particular name. In case the legatee is not specified and certain i.e. the Will is not in favour of a specified person, for such a legatee it shall be no condition to be alive at the time of the making of Will. The jurists have said that in case the particular legatee is present and is capable of receiving the property under a Will the basis of the validity of the proposal of the legatee shall relate to the time of the making of Will. If, however, the legatee is not a particular person the basis of the validity of the proposal shall relate to the time of the death of the legator.

If a person does not make a Will in favour of some one's issues named by name nor does he signify each of them by some other indications, the Will made shall be acceptable in favour of those issues who are present.

¹Al-Kāsāni, *Bada'i' al-Ṣanā'i'*, Cairo, 1327 A.H., vol. vii, p. 334; Al-Sarakhsi : *Al-Mabsūt*, Cairo, 1324 A.H., vol. xxvii, p. 177.

^{1a}Al-Kasani : *Bada'i' al-Ṣanā'i'*, op. cit. vol vii, p. 335.

the time of the legator's death, though they may or may not have been alive at the time of making the Will. As the legatees are non-specified only those who are present at the time of death of the legator shall be taken to be the legatees. If the legator mentions the name of the issues of someone or alludes to them, their presence at the time of making the Will shall be a necessary condition. If the legatees present at the time of making the Will (whose names are mentioned in the Will) die before the legator dies the Will shall become void, although other issues of that someone may be in existence.²

Maliki Practice :

According to Malikis making a Will in favour of a mosque is valid. Property under such Will shall be utilized for the purposes connected strictly with the mosque. According to Malikis a Will made for a person about whom the legator knows at the time of making Will that he is dead is valid. In such a case, the legatee's heirs shall be entitled to the legacy under the Will. If the legator does not know of the death of the legatee, the Will made shall be void and the legator's heirs shall be entitled to inherit the said property.³ Here an obvious objection may be that this rule goes against the one stated above that the existence of the legatee at the time of making the Will is essential. According to Malikis the intention in making a Will by the legator in favour of the legatee (inspite of the knowledge of the legatee's death) is, in fact, making a Will in favour of the heirs of the deceased legatee. As against this the Hanafis, Shafi'is and Hanbalis in both the cases hold being alive of the legatee as an essential condition, and do not decide the validity or voidance of the Will on the basis of knowledge or absence of knowledge of the legator about the legatee. According to this writer, the consensus of the said three Imams appears to be logically sound.

Shafi'i Practice :

Will made in favour of a legatee, whose identification is possible, but is not specified, shall not be valid. If a person, therefore, makes a Will saying, "I make a Will for the transfer of my slave in favour of one of those two persons", the Will made shall not be valid because the transfer is not in favour of an ascertained person.⁴

²Zayd Al-Abyani : *Sharh Al-Ahkam al-Shari'yyah*, Cairo, Commentary on Section 531.

³Al-Ābī : *Jawahar al-Aklil*, Cairo, vol. i, p. 317.

⁴Al-Firozabadi : *Al-Muhazzab*, Cairo, vol. i, p. 458.

Hanbali Practice :

Any person who is capable of becoming legally an owner of property may be a legatee. A non-Muslim though an apostate or of *Dār al-Ḥarb* should be a specified person. There are, in fact, two reported opinions of Imam Ahmad regarding an apostate. The first is to the effect that Will made in favour of an apostate is not valid. If the non-Muslim is not specified but described in general terms, for instance, with the words of "Jews or Christians" the Will made in their favour shall not be valid. Likewise Will made by a Muslim for Churches, Fire-temples, relating to books of Old Testaments and New Testaments (Torah and Evangile) in favour of non-Muslims shall not be valid.⁵

If the legator makes a Will in elective terms such as he says, "one-third of my property be given to one of these two persons", in such a case two views are reported from Imam Ahmad. One is to the effect that such a Will shall not be valid; the other is to the effect that it shall be valid.⁶ According to this writer if the Will is made in favour of a living person and a dead person, with or without the knowledge of his death, in both cases the Will made in favour of the dead person shall be void.⁷ Under Maliki practice, the Will made shall, however, be valid in the event of ignorance of the death and shall be void in the event of the knowledge of death on the part of the legator as has been stated above.

Shia'h Practice :

The existence of the legatee, according to Shi'ah rule of conduct as well, is essential. Will in favour of non-existing person shall not be valid; for instance, the Will made in favour of a dead person; or of a person deemed to be alive though actually dead at the time of making the Will; or a Will made to the effect that when a certain woman gets pregnant the Will shall take effect in favour of her child in the womb; or the Will made in favour of certain person's future issues.⁸

The viewpoint of Shi'ah Imamiyyah that the legatee must be in existence at the time of making a Will is in opposition to the views of the four schools of Sunni *fiqh* that the existence of the legatee at the time of the death of the legator will be relevant. According to the four Sunni schools of *fiqh*

⁵Abul-Barkāt : *Al-Muharrar fil fiqh*, Cairo, vol. i, p. 383; Sharafuddin Al-Maqdisi : *Al-Iqnā'*, Cairo, vol. iii, p. 56.

⁶Abul Barkāt : op. cit., vol. i, p. 383.

⁷Ibid.

⁸Al-Hilli : *Shara'i' al-Islam*, Beirut, vol. ii, p. 262.

if the Will is made by saying, "I make the Will in favour of a certain person's issue(s) who may come into existence in future" then even though that person has no issue at the time when the Will is made, but subsequently has some issue in existence or in the womb, that issue shall be entitled to get the property under Will. Whereas according to Shi'ah Imamiyyah the legatee's existence, in fact or in law, is essential at the time of making the Will. According to this writer the views of the four Sunni schools of *fiqh* appear to be sound and preferable.

Modern Legislation :

Egyptian Law :

There has been some legislation in the Arab countries in respect of legatees. The relevant provisions of the laws of Egypt and Syria are cited below:—

Section 6. The conditions for a legatee are :—

- (a) He should be an ascertained person.
- (b) He should be alive, in case of a specified person at the time of the making of the Will.

If the Will is not in favour of an specific person, the presence of the legatee at the time of the making of Will or at the time of legator's death shall not be relevant but regard shall be had to the rule laid down in Section 20.

Section 26. A Will of a specified thing in favour of an existing and non-existing legatees, shall be valid. If anyone of the legatees is not existing at the time of death of the legator the property under his legacy shall be considered to belong to his (legatee's) heirs. If no one exists the legacy shall belong to the heirs of the legator.

After the death of the legator, if any legatee is found to be present or comes into existence thereafter the legacy shall belong to him. If someother legatee comes into existence (or is found present) he shall be his co-sharer and all other legatees who shall come into existence shall keep on becoming co-sharers in the current usufructs with the previous legatees till the chance of further legatees coming into existence in future ceases. All ascertained legacy and the income therefrom shall belong to all the legatees and the share of the one who dies shall be inherited by the heirs of the deceased.

Section 27. When a Will is made in favour of those legatees who are mentioned in Section 26 and the Will is concerning only the usufructs and none of the legatees exists at the time of death of the legator, the usufructs shall pass to the legator's heirs.

If any legatee exists at the time of death of the legator or comes into existence thereafter, the usufruct shall then go to him and to all rightful legatees coming into existence till the possibility ends. After these legatees the legator's heirs shall have the right to the estate. When the chain of legatees ends the usufructs shall revert to the legator's heirs.

Section 28. When no other legatee except one comes into existence (or is found present) this person shall be solely entitled to all the usufruct or to entire ascertained legacy excepting when there is a writing of the legator or there are circumstances that point to the fact that the legator had intended its sharing out, in such event that (sole) person shall be entitled to his share only and the heirs of the legator shall be entitled to the rest of the estate. The ascertained legacy shall be divided between the present legatees and the heirs of the legator when there is no chance of a coming into existence of other legatees.

Section 29. When the Will concerning usufruct is made in favour of more than two generations or groupings it shall be considered valid to the extent of two generations only. If the order of the two generations or groupings in respect of legacy has been fixed the next generation or grouping shall be entitled under the Will, with all the privileges under the provisions of law as stated in the foregoing two sections, only, when there is no chance for the coming into existence of the legatees of the first order. When both the generations or groupings are exhausted the specified legacy shall form part of inheritance of the legator unless where the legator may have made Will in favour of other persons or for other purposes after the exhaustion of the two.

Section 30. Will made in favour of limitless number of legatees shall also be valid and people in general shall be entitled under that Will. The work of the division of the legacy between the legatees shall be done at the discretion of the executor without his being fettered with the condition of providing for all or in equal division of benefits.

The person or the group of persons whom the legator appoints, is entitled to put the Will into effect shall be the authorised executor.

Section 31. When a Will is made for a limited group and all those who form the group are not included therein by words or are not specified by names, and from amongst them some of the legatees are not, at the time of death of the legator, capable of being legatees under the Will, in such events all the properties under the Will shall belong to other legatees subject to the provisions of law as contained in Sections 26, 27, 28 and 29.

Section 32. When a Will for any cause is made jointly between the ascertained individuals and a group of persons, a part of the legacy shall, in the circumstances, be considered to be a Will made in favour of each ascertained individual of the limited group as well as made collectively in favour of individuals of the unlimited group.

Section 33. When a Will is made of a legacy in favour of ascertained individuals and they are such that they, at the time of death of the legator, are not possessed of the capacity of being legatees, the legacy shall be considered to be the estate of the legator open to inheritance.

Section 34. When the Will in favour of ascertained legatees or in favour of a group is held void, the quantum of the legacy shall revert (for the purposes of being divided among the heirs of the legator) to the estate and the heirs of the deceased alongwith any other legatee or legatees shall in due proportions take their shares.⁹

Syrian Law :

Section 212. Following are the conditions for the legatee :—

- (a) He should be specified;
- (b) In case he is specified, he should be in existence at the time of making of Will and the death of the legator.

Section 230. (a) When the legatee is alive at the time of death of the legator he shall be considered to be the owner of the legacy from the time of death of the legator provided the legator has not fixed a time for the passing of ownership after his death.

(b) Accretions in the legacy found at the time of the legator's death shall, irrespective of the Will, belong to the legatee, and incurring of all expenses regarding legacy shall be the liability of the legatee from the time he becomes entitled to it.

Section 231. (a) A Will made in favour of specified non-existing legatees, or where some are non-existing and some existing legatees (when they can be counted) shall be valid. If none of the legatees is found present i.e. existing at the time of legator's death, the heirs of the legator shall have their right over the income of the legacy. When there is altogether no chance of the existence of the legatee, the ascertained legacy (corpous as well as usufructs) shall belong to the heirs of the legator.

(b) If any legatee is found present at the time of death of the legator or comes into existence thereafter, he shall be entitled to the income of the

⁹Qanūn Al-Wasiyyat of Egypt, 1946.

legacy, and the legatees who, thereafter, keep on coming into existence, shall be his sharers in the legacy. This chain shall continue till the chance of coming into existence of other legatees in future ends. The quantum of the property and the income therefrom shall then be the property of the present legatees and after their death it shall be considered as their heritable estate.

(c) If the Will is made merely of the usufruct, the legatees who are present at the time of or after the death of the legator, shall be entitled to that usufruct. In case there is no chance of coming into existence of the legatees, the ascertained legacy shall revert back to the heirs of the legator.

Section 232. (a) A Will in favour of the issue of an issue the extent of one generation only shall be valid.

(b) On the first generation becoming extinct, the legacy shall be included in the estate of the legator and shall become open to the inheritance of his heirs except when a Will of the legacy wholly or partly is made thereafter in favour of some other persons.

Section 233. (a) A Will made in favour of unlimited number of individuals shall be valid and those out of them who are in penurious shall get priority in the benefits arising out of the Will in their favour and its distribution between them shall be made at the discretion of the Executor. He shall not be bound to distribute it among all those individuals on the basis of equality.

(b) The one who has the right of implementing a Will is called an authorised executor. In the event of one not being appointed an official of the government or the one appointed by the latter shall have the authority.

Section 234. When the Will is made in general words in favour of limited number of persons not specified by names and some of them at the time of death of the legator are not qualified to hold property under the Will, the rest of the persons shall, in accordance with the provisions of law as contained in this chapter, be entitled to the entire legacy under the Will.

Section 235. When the Will is joint in favour of specified persons and a cause, or is jointly in favour of a group and a cause, or is joint in favour of all of them, then a share in the Will shall be fixed in favour of each ascertained person, or in favour of each individual of the limited group, or in favour of the stated cause.¹⁰

Indo-Pakistan Courts' Rulings :

A Muslim is entitled to make Wills consecutively in favour of more than one legatee.¹¹

¹⁰Qanūn al-Ahwāl al-Shakhsiyyah, Syria, 1953 (*Ahkām al-Wassiyyat*).

¹¹*Fazal Noor vs. Karam Naor*, P.L.D. 1956 Lahore 774; AIR 1932, P.C. 172; 75 I. A. 62.

The Lahore High Court, in the case of "*Channo Bai vs. Muhammad Riaz*" held: "the Muslim Law contains two rules about the existence of the legatee in order that he may benefit from the Will; one being that he must be in existence at the time of the making of the Will either actually or presumably, the presumed existence meaning birth within six months of the Will, and the other that he should be in existence at the time of the death of the testator. At first sight there appears that the two rules are irreconcilable, but a careful consideration reveals that the two rules deal with two different sets of circumstances and are completely reconcilable with each other." "... Under the Muslim Law as in other laws a Will ordinarily becomes operative from the moment of the death of the testator and it is for that reason that a Will of a Muslim that the children of so and so will get such and such property, becomes operative from the death of the testator, subject to the condition that the Will or any part of it is not invalid for any reason." "..... In the present case the Will was not in favour of a foetus but in that of any child of the testator's daughter that may be born to her, and the condition of birth of the legatee within six months of the bequest being inapplicable, the Will was operative in favour of Muhammad Riaz respondent as he was born before the death of the testator. Muslim Law of succession having become applicable to the estate of Shah Wali from the date the West Punjab Muslim Personal Law (Shari'at) Application Act, 1948, received the assent of the Governor General of Pakistan, i.e., the 15th of March 1948, the Will of Shah Wali could not affect more than one-third of his property because under the Muslim Law it is only with regard to one-third of the testator's property that a Will is valid and as Muhammad Riaz is not, under the Muslim Law, an heir to the estate of his maternal grandfather, the bequest, which would have been void if he were an heir, suffers from no defect on that ground."¹²

Nomination for Provident Fund :

Mr. Justice Wahid Uddin Ahmad in the case of "*Muqaddar Khan vs. Burma Shell*"¹³ held: "Under the Muhammad Law he (a nominee) is not the legal heir of the deceased. He was, therefore, not entitled to recover the amount in dispute from respondent No. 1. It was contended by Mr. Anis Ahmed, the learned counsel for the Petitioner, that the fact that the deceased nominated the Petitioner at the time of his employment clearly shows that he had made a 'Will' in respect of the Provident Fund in his favour. This

¹²PLD 1956 Lahore, 786.

¹³PLD 1968 Karachi, 523.

contention has no force, as held in *Hardial Devi Ditta vs. Janki Das and another* (AIR 1928 Lahore 773) that “a nomination of a person to receive Provident Fund money from a Corporation is not a Will, a gift or a trust in favour of the nominee and on the subscriber's death the Fund forms part of his undisposed of estate”. This view was also taken in the case of *Nur Muhammad v. Mst. Sardar Khatun* (AIR 1949 Sind 38). It was held in this case that “right to receive” is not equivalent to “right to receive beneficially”. It was further held that: “The effect of the provident fund vesting in the nominee, when the nominee is a dependant, is therefore quite clear. It confers on the nominee the immediate right to possession and dominion over the amount, without in any manner effecting the beneficial rights of the actual owners, whoever they be, either as heirs or legatees. The language of the Act does not permit one to say that the Act confers on the dependent nominee anything more than the right to possession and dominion, and such as an executor has, in whom the property of a deceased testator vests. Of course, if the dependent nominee happens to be the only heir of legatee, and is therefore also entitled to the beneficial rights in the sum, the entire rights of ownership would vest in him.

In the light of the above discussion, the learned judge held, “it is quite clear that the petitioner on the basis of his nomination cannot claim that the amount in dispute was bequeathed on him or he is the legatee under any will. I, therefore hold that the petitioner is not entitled to the amount in dispute on the basis of his alleged claim that the nomination made in his favour was in the nature of a will.”

Nominee for Insurance :

According to this writer the same rule may be held to apply in the case of “Insurance” policy too. The nominee, in fact, has the right of realisation of the money from the ‘Insurance Company’. Merely on the basis of his nomination he can not be held to have acquired any proprietary right in it. His right of realisation is meant to facilitate and protect the Company from litigation between the Company and the heirs of the deceased. So far as the nominee, heirs of the deceased and the legatees are concerned recourse shall be had to the Muslim Personal Law of Will and Inheritance, which was applicable to the deceased at the time of his death for the decision of their rights. In the circumstance, the nominee at best may be held to be a trustee with a right of realisation of deposits with, and dues on, the Company or the government; and the Company or the government institutions after proof of his nomination may pay up the deposits or the dues of the deceased to that nominee. The Company or the government institution, thus gets due protection that the money as has been paid to the nominee of the deceased without

going into the question whether he is or is not the heir or legatee of the deceased. The Company or the government institution, in view of the nomination, duly filed with it, is in strong position against any claim of the heirs or the legatees. So far as the question of division of the money so realised between the heirs and legatees is concerned the nomination does not carry or acquire the effects of a gift or Will in favour of the nominee. The estate shall be divided according to Shari'ah. If the nominee is an heir, he shall also get his share in inheritance according to Shari'ah. Or if the legator has clearly and unequivocally expressed through his nomination a proprietary right in any part of his estate as a Will in favour of his nominee as a legatee the law of Will, in that case, shall be applicable in his favour. This view of the author was expressed by him in his *Majmu'ah Qawanin-i-Islam*, 1973, Vol. IV, pp. 1348-49. Subsequently, the Supreme Court of Pakistan in its judgement reported in PLD 1974 S. C. 185 in the case of *Amtul Habib vs. Musarrat Parveen* also expressed the same view that the nomination does not operate either as a gift or as a Will and therefore can not deprive the other heirs of the nominator who may be entitled thereto under the law of succession applicable to the deceased.

Nomination under Cooperative Societies Act :

The Karachi Bench of the High Court of West Pakistan constituted of M.R. Kayani and Illahi Bakhsh Khamisani JJ. had held earlier in the case of "*Karim vs. Hanifa*" (reported in PLD 1970 Karachi 613) that "The person who is nominated under Section 27 of Bombay Co-operative Societies Act, 1925 for collection of benefits to the members is not merely the administrator or the executor who may take the property in his possession on behalf of the heirs of the deceased member, rather he himself is the proprietor of it without other's sharing with him." This decision differed from the judgement of "*Hidayatullah vs. Mst. Rahiman*" reported in AIR 1935 Sind, p. 73. This writer expressed his view in *Majmu'a Qawanin-i-Islam*, 1973 Vol. IV, p. 1349 that the view as expressed by the learned judges in the above case is nugatory to the Muslim Personal Law of Gift, Will and Inheritance. It was, therefore, advised the said Section 27 of the Co-operative Societies Act be amended in such a manner that it may not come into conflict with the Muslim Personal Law of Gift, and Inheritance. Later, the Supreme Court has correctly overruled the above decision of Karachi Bench (PLD 1974 SC 185).

Section 240. A Will made in favour or for the benefit of
Will for acts of mosques, schools, inns, monastries, charitable
blessings institutions and for virtuous purposes that may
earn reward in Hereafter, is valid.

COMMENTARY

There is, under Islamic Law, full scope for making Will for virtuous acts and pious deeds and purposes. Consequently a Will made for mosques and schools or for inns and monasteries shall be valid and the property under Will shall be utilized in their constructions and on maintenance of destitute persons etc. Likewise, Will for all kinds of virtuous acts of blessings shall be considered to be valid, for instance, construction of bridges, mosques or making provision for other necessary things for the general welfare of the common man, such as grant of scholarships to students, establishment of libraries etc. Although these matters are of a nature where no ownership is passed but the Will to erect, support or maintain them shall be valid. All the Imams are agreed on this point.¹⁴

Under Hanbali *fiqh*, if a Will is made for charitable, virtuous and pious acts that are means of nearness to God, it shall take effect and of all such purposes that of a holy war (*Jihād*) shall get priority.¹⁵

A Will for charitable purposes is preferred over a Will for incurring expenses on non-compulsory Haj.¹⁶

Under Shi'ah *fiqh* if a Muslim makes a Will for destitute persons, it shall be understood as only in favour of his co-religionist destitutes. If the needy legatees are non-Muslims, the Will shall be considered to be in favour of the needy belonging to the legator's family. If the Will is made for propagating the name of God, it shall be spent on matters which may earn a reward in the Hereafter. There is a reported opinion to the effect that if there is a Will *fi sibilillah*, it shall be understood specifically for the Mujahidin (those who are engaged in religious war).¹⁷

Modern Legislation :*Egyptian Law :*

Section 7. Will made for expending on construction of places of worship, on educational buildings, repairs of such buildings and on public welfare and on other such expedencies or on poor students or on other like matters shall be valid, provided the expenditure has not been fixed by usage

¹⁴Al-Shi'rani: *Al-Mizān al-Kubra*, Cairo, vol. ii, p. 108; *Fatawa Alamgiri*, Deoband, vol. iv, pp. 225-26.

¹⁵Sharfuddin Al-Maqdisi : op. cit. vol. iii, p. 60.

¹⁶Ibid, p. 61.

¹⁷Al-Hilli : op. cit. p. 263.

or by some other mode. The Will made in the name of God or for acts of blessings without fixation of any mode shall be valid and in such a case the property under Will shall be utilised for the public welfare.

Section 8. If among matters of public welfare a Will is made for such a fixed purpose that may come into existence in future, yet the Will made shall be valid. If, however, the existence of that matter has become or is impossible, the Will made shall then become void.¹⁸

Tunisian Law :

Section 73. A Will made in favour of places of worship and institutions of Law shall be valid.¹⁹

Syrian Law :

Section 213. (a) A Will made in the name of God and for all pious acts shall be valid although the mode of their expenditures may not have been fixed.

(b) A Will made for construction, and repairs of places of worship, of educational and public welfare institutions, and the Will made for destitute persons and for other like public welfare matters shall be valid. In case of the non-fixation of the propose it shall be ascertained on the basis of usage and presumably pious matters.

Section 214. A Will made for a fixed act of public welfare referring the same to a future period shall be valid. If the act becomes impossible of performance an act of like pious nature shall be held to be one for which the property under Will shall be utilized.²⁰

Section 241. (1) A Will in favour of an heir without the permission of other heirs shall not be valid. It is essential that the permission is given after the death of the legator and the heirs who give permission must have legal capacity to do so.

(2) The question of a person being or not being an heir shall be relevant at the time of the death of the legator, not at the time of the making of the Will.

¹⁸Qanūn al-Wasiyyat of Egypt, 1946.

¹⁹Qanūn al-Wasiyyat. Tunis.

²⁰Qanūn Al-Ahwal al-Shakhsiyyah, Syria, 1953.

(3) The heirs after having given their consent shall have no right of revoking such consent. If some of the heirs give their consent and others do not, the Will shall take effect in respect of the shares of the heirs who have given their consent and shall be held to be void regarding the shares of the heirs who withhold their consent.

(4) Will in favour of a stranger (non-heir), in the event of there being no impediment to it, shall not depend upon the consent of the heirs. However, if the Will is for more than one-third of the legator's property the taking effect of the Will to the extent of the excess shall depend upon the consent of the heirs provided such heirs can legally give away their property gratuitously and such consent is given after the death of the legator.

Exception : In case of the legator being a Shi'ah, the Will in favour of an heir to the extent of one-third shall be valid and enforceable without the consent of other heirs.

COMMENTARY

After payment of the dues, if any, against the legator, in case there is a Will, the question shall be whether the Will has been made in favour of a stranger or in favour of an heir. If the Will has been made in favour of an heir it shall not be put into effect without the consent of the other heirs, although the Will may be in respect of less than one-third of the estate of the deceased.

The basis of this rule is the Prophet's traditions "God has bestowed rights upon each of the entitled ones, the Will now in favour of any heir is not valid."²¹ Further, "There is no Will for an heir except when the (other) heirs consent to it".^{21a} If a Will in favour of an heir without the consent of other heirs is held valid, the other heirs in whose favour no Will is made shall be put to loss. This is so, for the heir-legatee shall acquire greater portion of the legacy compared to other heirs than what is fixed for him by God. This may lead to the breaking up family ties and create ill feeling

²¹ *Mishkat al-Masatih*, Karachi, p. 265.

^{21a} *Ibid*.

and disruption in social relations. If, however, the implementation of the Will made in favour of an heir, is made dependent on the consent of other heirs, the potential disruption in relationship and creation of ill-feeling among them shall not necessarily follow. On the contrary, the family relations and mutual love shall remain intact and no malice or enmity shall ensue. Only the consent given after the death of the legator shall be valid and the consent given during the lifetime of the legator shall not. Consequently, if the heirs give consent to a Will made in favour of an heir during the lifetime of the legator and revoke it after the death of the legator the Will cannot be put into effect. If they give such consent to the Will in favour of an heir, after the death of the legator they shall then have no right to rescind it, because only the permission given after legator's death is proper and binding. It is essential for the consent being valid that the person who gives his consent be legally competent of gifting away his property or "of freely dealing with his property". If not, the consent shall not be valid. The permission given by a child, insane and senseless person, on this ground, is not valid because none of them is competent of giving away his property in that condition. The time relevant for determining whether a legator is an heir or not is the time of death of the legator. The time of making the Will is of no consequence, because proprietary right through a Will is created only with reference to the time after the death of the legator. Hence, acquisition of the title by the legatee depends on the time he may legally acquire such title and evidently that time is only after the death of the legator.

Examples : (i) A person has a real brother, wife, and mother and he makes a Will in favour of his brother; thereafter a son is born to the legator and later the legator dies. The brother is no longer an heir. He shall be entitled to the property under the Will not exceeding one-third of the estate. If the Will is in excess of one-third, consent of the heirs will be necessary for the legacy exceeding one-third. The brother of the legator, in the above stated case, although an heir at the time of making of Will was no longer so at the time of death of the legator due to the birth of a son of the legator. The Will in his favour shall, therefore, be held to be valid.

(ii) If the son of the legator, in the above stated case, is supposed to be present at the time of Will being made in favour of the brother but he dies before the death of the legator, in such a case although the brother at the time of the making of Will was not an heir and the Will in his favour

was valid, yet at the time of the legator's death he became an heir; hence the Will in his favour shall not be effective without the consent of other heirs.

(iii) A Muslim dies leaving behind him a son, father and grandfather. There is a Will in favour of the grandfather. As grandfather is not an heir, Will in his favour shall be valid and effective.

(iv) A Muslim leaves a Will in favour of his grandfather. At the time of his making the Will his father and son, besides his grandfather, are also present. The father dies in his lifetime. The grandfather being, then, an heir shall get his share according to rules of inheritance. The Will, therefore, shall not take effect in his favour without the consent of other heirs.

(v) A Muslim bequeaths a property to his brother through a Will. At the time of making the Will the legator had only a daughter and a brother are alive. After the Will was made a son was born to the legator. Thus the legator at the time of his death left surviving a son, a daughter and a brother. Although the brother at the time of the making of Will was an heir, he did not remain an heir at the time of the death of the legator. The Will, therefore, would take effect in his favour.

Will in favour of non-heir :

In case there is no debt due against the legator or the debt due has already been paid off, and he makes a Will in favour of a stranger (non-heir), not being more than one-third, it shall take due effect without the consent of heirs. If it be for more than one-third, the obtaining consent of the heirs shall be essential for that excess; provided there is no other legal impediment.

In this connection it is necessary to point out that, according to the Hanafis, the heirs giving their consent for the Will to be put into effect (whether the consent to the Will is in favour of an heir or a non-heir) the legatee shall be considered to be entitled to the property under the Will ensuing from the legator and not from the heirs' side. Consequently, an heir who gives consent shall not thereafter have the right of rescinding it; rather he shall be forced to make over possession of the legacy to the legatee. If the ownership of property under the Will is held to have proceeded from the heir, who gives consent to the Will being implemented, the provisions of the law of gift would be attracted and its cancellation would have been possible before the transfer of its possession, as it is a well recognised rule that gift

without the delivery of possession is not complete. On the other hand the legatee, no sooner the consent is given, becomes the owner of the property as here the transfer of possession is no necessary condition. Had the legatee become an owner through the heir's consent, the legatee would not have become the owner without the transfer of possession. It would have been a gift, wherein ownership is not established without the delivery of possession. The same principle shall apply in case of a Will of undivided share.²²

Shafi'is' Practice :

According to Imam Al-Shafi'i, a Will for more than one-third of the estate where no heir of the legator is alive, shall be absolutely void, because there is no authorised person to give consent to the Will of the quantum in excess and this quantum, therefore, becomes the property of Muslims in general. There are, however, two opinions of the Shafi'i jurists in case the heirs are present. The one view is to the effect that the Will exceeding one-third of the estate shall be void inspite of the heirs' presence. Permission given by the heirs shall not be acted upon because the Will for more than one-third is forbidden by the Prophet's tradition. Hence, what is forbidden under law shall not become valid by the permission of any one. The other view is to the effect that the Will exceeding one-third shall be contingent upon the permission of the heirs. It shall be put into effect after the permission is obtained, otherwise it shall be void. The consent of the heirs to the Will exceeding one-third, shall be considered to be a gift from the heirs, and no transfer will take place by the Will of the legator (for that excess). Hence all the conditions of a gift after such consent shall apply thereto.²³ Imam Shafi'i, however, agrees with the other Imams that valid permission is only that which is given after the death of the legator.

Malikis' Practice :

According to Imam Malik too, permission and acceptance of a Will only after the death of the legator are valid. Will regarding more than one-third of the property, according to the Malikis, in all cases, is void.²⁴

²²Al-Kasani : op. cit. vol. vii, p. 370; Al-Marghinani : op. cit. vol. iv, pp. 657-58.

²³Al-Shafi'i : *Kitab al-Umm*, Cairo, vol. iv, p. 105; Al-Firozabadi : op. cit. vol. i, p. 457.

²⁴Al-Ābī : op. cit. vol. ii, pp. 317-18; Ibn Rushd : *Bidayatul Mujtahid*, Cairo, vol. ii, p. 336.

Hanbalis' Practice :

The Hanbali jurists are in agreement with the Hanafis on the question of acceptance of the Will and of giving permission after the death of the legator by the heirs in case the Will exceeds one-third.²⁵

Zahiris' View :

A Will regarding more than one-third of the property, according to Zahiris, is in all cases void whether the heirs are present or not present and whether they give or do not give their permission.²⁶

Shi'ah Imamiyyah :

The Shi'ah Imamiyyah, on the aforesaid questions, are in agreement with the Hanafis in general.²⁷

Will in favour of heir :

Hanafi View : A Will in favour of an heir without the permission of other heirs, according to the Hanafis, is not valid. The Prophet has said, "God has bestowed upon each of the entitled ones his right, hence there is no Will in favour of any heir, except when the heirs consent to it."²⁸

Shafi'i View : There are two reports from Imam Shafi'i regarding Will in favour of an heir. The first is to the effect that the Will is not valid as is stated in a tradition from Jābir that the Prophet has said, "There is no Will for any heir."^{28a} The second view reported from Imam Shafi'i is to the effect that the Will is valid as it is reported from Ibn 'Abbās that the Prophet said, "Will in favour of an heir is not valid except when the (other) heirs give their consent."^{28b} This tradition proves the fact that if the heirs do agree, the Will may become valid and effective. Such a Will, according to them, shall not take effect as ensuing from the legator; it shall, rather, be

²⁵ Al-kharqī : *Al-Mukhtaṣar*, Demascus, p. 111; Sharfuddin Al-Maqdisi: op. cit. vol. iii, p. 50.

²⁶ *Ibn Hazm* : op. cit. vol. iv, p. 387.

²⁷ Al-Hilli : op. cit. vol. ii, p. 259.

²⁸ Al-Kasānī : op. cit. vol. vii, p. 337 :

” ان الله قد اعطى حق كل ذى حق فلا وصية لوارث “

28a

لا وصية لوارث -

28b

لا تجوز لوارث وصية الا ان يشاء الورثة -

taken to have been sanctioned by the heirs and out the ownership of their own property received in heritage.²⁹

Maliki View : A Will in favour of an heir with the consent of other heirs is, according to Malikis, valid and effective.^{29a}

Hanbali View : A Will in favour of an heir and in favour of a stranger for more than one-third, according to Hanbalis is not valid except when the heirs give permission. If a Will of a particular property from the estate is made in favour of an heir, equal to his share, it is valid and that particular property shall be given to that heir. If a person makes a Will in favour of a person who apparently, at the time of the making of Will, is an heir, but at the time of death of the legator does not remain so, the Will in his favour shall remain intact because, in case of the legatee being an ascertained one, the question of the validity or otherwise of the Will hinges on the time of the death of the legator.

As with the Hanafis, where the Will is dependent on the permission of the heirs, if the heirs give such permission, the Will of the legator shall be considered to have taken effect from that permission and shall not be considered as gift proceeding from the heirs and the provisions of the law of gift shall not apply to it.³⁰ The Shafi'i jurists, however, holding the 'permission of heirs' as a gift consider it, in effect, a fresh settlement of property.

Shi'ah Practice : The correct interpretation in Shi'ah *fiqh* is that Will in favour of a stranger and heir both are valid, provided it does not exceed the limit of one-third of the property, in which case it shall depend on the consent of the heirs.

If a legator, according to Shiah Imamiyah, makes a Will in favour of his "relatives" using that particular word, all those who are commonly called "relatives" shall be included in that Will. There is also another view that by the word "relatives" only those relatives are meant who are closer to the deceased through the relationship of his grandfather, but there is no legal sanction for the same in their *fiqh*. If a Will is made with the word, "family", the people who are closest in the lineage of the legator shall be

²⁹Al-Shafi'i : *Kitab al-Umm*, vol. i, pp. 99, 108, 112 and 115; Al-Firozabadi : op. cit. vol. i, p. 458.

^{29a}Al-Zarqani : *Sharh al-Muwatta*, Cairo, vol. ii, p. 480; Al-Ābi : op. cit. vol. ii, p. 318.

³⁰Ibn Qudamah : *Al-Mughni, Matba' al-Salafiyyah*, vol. ii, p. 359; *Al-Kharqi: Al-Mukhtasar*, Demascus, p. 111.

deemed to be included in the Will. If a Will is made in favour of 'nation' the people speaking the same language as that of the legator shall be meant included. The word, "*Ahl Bait*" shall be taken to mean the members of the same family whether ascendants or descendants. By the word "Neighbours" are meant the neighbours of forty continuous houses. (These interpretations appear to be based on the then existing social conditions of the Shi'ah community).

According to Shi'ah Imamiyyah, a Will made in favour of relatives, whether they are heirs or not, is a meritorious act. In the event of the Will made with the word "*aqārib*" (relatives) it shall be implemented by division among them on the basis of the scale prescribed for inheritance. Hence, in presence of a near relative the remote one shall have no right under the Will.³¹

Zahiris' Practice: Will in favour of an heir, according to Zahiris is totally invalid. If a person makes a Will in favour of a non-heir but he is held to be an heir at the time of death of the legator the Will shall become void. If the Will is made in favour of an heir but he at the time of death of the legator does not remain one, the Will shall not be valid in as much as it was not valid at the time of its being made. The permission or refusal of the heirs, according to them, has no bearing on the matter. The Prophet's verdict that "there is no Will in favour of any heir" is final in the matter. God too forbids Will in favour of an heir. Indeed, these persons can legally make a gift. Same are the views of Muzani and Sulayman.

Imam Ibn Hazm³² in support of the above view writes: "If an objection is raised here that this tradition is reported on several similar authorities with the addition that the Prophet at the conquest of Mecca^{32a} in his Declaration said "لا تجوز وصية لوارث الا ان يشاء الورثة" (that a Will in favour of an heir is not valid, unless the (other heirs) do consent to it) the answer to it is, that the said tradition is *mursal*; it does not carry the name of any Companion (as its narrator) and the *mursal* tradition carries no authority specially when the credentials of its narratives are weak." (According to Hanafis a *Mursal* tradition is, however, acceptable).

³¹ Al-Hilli : op. cit. p. 263.

³² Ibn Hazm : op. cit. vol. vi, p. 386.

^{32a} There are different versions the about occasion of this saying of the Prophet. Some traditionists say that it was stated by the Prophet in his famous Sermon at the parting *Hajj*.

Modern Legislation :

Egyptian Law : A Will for one-third of the legacy in favour of an heir as well as non-heir is valid and may be put into effect without the permission of the other heirs. A Will for more than one-third too is valid but the same cannot be put into effect without the permission of the heirs, provided such consent is given after the death of the legator and all such heirs are qualified enough to give their property gratuitously and fully understand the value of what they are consenting to. In case legator is not under debt and has none of his heirs existing, the Will made by him can be put into effect wholly or partly without the permission of the Government.³³

Iraqi Law : It has been held under Section 73 that Sections 1108 to 1112 of the Civil Code shall be made applicable to the Will.

Tunisian Law : A Will in favour of an heir or a Will regarding more than one-third of the property cannot be put into effect after the death of the legator without the permission of the heirs.

Legator's designating a particular property out of the legacy specifically in favour of all or some of the heirs is valid provided the value of the particular property is in accord with that of the legatee's share in the heritage. It shall be put into effect after the death of the legator. In case of the particular property being more than the share in the heritage, the provisions governing a Will in favour of heir regarding the excess shall be enforced. (That is, if the other heirs consent, the excess share shall be given to that legatee, otherwise it shall be divisible by way of inheritance (Section 180).³⁴

Syrian Law : (i) A Will, in favour of a non-heir, shall, after payment of all debts, be put into effect to the extent of one-third of the remaining property irrespective of the permission of the heirs.

(ii) A Will in favour of heirs (though it may be of less than one-third) and in favour of non-heir of more than one-third shall not be put into effect, except when the heirs, after the death of the legator, give permission for its implementation, provided they are qualified to give such permission.

(iii) A Will made out of the legacy submerged under debts shall not be put into effect without the permission of the creditors, capable of giving permission, or without the debts being condoned.

³³Qanūn al-Wasiyyat, Egypt, 1946, Chapter 2.

³⁴*Mujallatul Ahwāl*, al Shakhsiyyah, (Qanūn al-Wasiyyat), Tunis.

(iv) When there is no debt against the legator and he has no heir, a Will made by him shall take effect regarding his entire property. Its taking effect shall not depend upon the permission of some one else (Section 238).³⁵

Late Shaikh Mustafa Al-Sabba'i of Syria in his book, *Al-Aḥkām al-Ahliyyah wal-Wasiyyah* (Vol. ii p. 93), however, holds a Will in favour of heirs to be valid. He argues, "When a Will is valid in favour of a stranger it should all the more be valid in favour of an heir. The viewpoint of Shaikh Al-Sabba'i, in view of the traditions stated above, shall have to be discarded.

Indo-Pakistan Courts' Rulings :

Mr. Justice Mahboob Murshid of Dacca High Court has held in the case of "*Amina Khatoon vs. Sadiqur Rahman*", "Under the Mohammadan law if A bequeaths a life-interest to an heir B, and thereafter the remainder to C, a non-heir, the bequest to C Will fail if the life estate to B is invalid for want of consent of the heirs.³⁶ This observation that the bequest to C Will fail does not appear to be correct. It is said in the *Fatāwā 'Ālamgiri* that if a person makes a Will in favour of a stranger and an heir, the Will in favour of the stranger shall take effect and for the heir it shall depend upon the permission of the other heirs. If they give such permission the Will shall take effect, otherwise it shall become void.^{36a} This question has also been dealt with in *Al-Mabsūt* by Imām Sarakḥṣi and it is said that if a Will is in favour of both an heir and a stranger and the heirs are not agreeable to the Will in favour of the heir, the Will in favour of the stranger only shall take effect to the extent of his share in the Will.^{36b}

The viewpoint of Indo-Pak subcontinent courts has also been to the effect that a Will in favour of an heir is not valid. Indeed in the Punjab, before the coming into force of the Shari'at Application Act in 1948 a Will in favour of heirs has been taken to be valid, according to the local custom. Now, particularly from 1962, all disputes regarding Will are decided according to Islamic Shari'ah under the West Pakistan Shari'at Application Act of

³⁵ Qanūn al-Ahwāl al-Shakhsiyyah, (Qanūn al-Wasiyyat), Syria.

³⁶ PLD 1960, Dacca 647.

^{36a} *Fatawa 'Ālamgiri*, Dewband, vol. iv, p. 223; Al-Haskafi : *Al-Durr al-Mukhtar*, (o.m.o.) *Radd al-Muḥtar*, Cairo, 1324 A.H., vol. v, p. 593.

^{36b} Al-Sarakḥṣi : *Al-Mabsūt*, op. cit. vol. xxvii, pp. 175-76.

1961. Hence, the High Court of Punjab has held in the case of *Channo Bai vs. Mohammad Riaz* that West Pakistan Muslim Personnel Law (Shari'at) Application Act, 1948 after being put into force a Will in favour of a widow could not be acted upon but a Will in favour of maternal grandson, of certain, shall not be ineffective because he, on account of not being, in the circumstance, an heir, is entitled under Will. The judgement thus states, "Muslim Law of succession having become applicable to the estate of Shah Wali from the date the West Pakistan Muslim Personal Law (Shari'at) Application Act, 1948, received the assent of the Governor General of Pakistan, i.e. the 15th of March, 1948, the Will of Shah Wali could not effect more than one-third of the testator's property that a Will is valid, and as Mohammad Riaz is not, under the Muslim Law, an heir to the estate of his maternal grandfather, the bequest which would have been void, if he were an heir, suffers from no defect on that ground".³⁷

The Pakistan Supreme Court has also in the case of *Ehsan Elahi vs. Hukum Jan*, held that a Will in favour of an heir without the consent of other heirs would be invalid and that the Will could not be effected in more than one-third of the legacy. In the words of Justice A. R. Cornelius, "A Will in favour of an heir requires the consent of all the other heirs to be valid in Muslim Law, and here no consent is shown. The sons were throughout opposed to any land being given to Mst. Mirza Nur. More than one-third of the estate of the testator cannot be validly bequeathed under Muslim Law, and here the whole was included in the bequest.....the Will was clearly in violation of Muhammadan Law. Therefore it would seem difficult to procure aid from the Muslim Law for the interpretation and application of this Will."³⁸

A Will under which proceeds from a property was reserved in favour of an heir without the consent of other heirs was held to be invalid.³⁹

A Will in favour of an heir is not valid except when other heirs, after the death of the legator, give their consent to it.^{39a} Permission or consent by one of the heirs is effective to the extent of his share only. Other heirs cannot object to his consent afterwards.^{39b} A Will that has been made

³⁷PLD 1956 Lahore, p. 786.

³⁸PLD 1967, Supreme Court, 200.

³⁹PLD 1969, Lahore, 587.

^{39a}PLD 1967, Supreme Court 200; PLD 1966, Peshawar 147.

^{39b}AIR 1944, Qudh 139; AIR 1922, Privy Council 391.

in favour of an heir, but is not consented to by the other heirs, shall not take effect.^{39c}

The Allahabad High Court, in a case held that if the persons getting consent are themselves insolvents, their consent shall yet be effective and the legatee and not the court—receiver shall be the owner of the legacy.^{39d} To this writer, the decision does not appear to be correct. How an heir, who is insolvent, can transfer the proprietary right in a property to another as long as he has not obtained the discharge certificate. There is every apprehension that the heirs, with a view to save the property from going into the power and possession of the receiver, may give their consent to the bequest. Allahabad High Court, again in its decision reported in A. I. R. 1930 All. 489, 122 Indian cases 762, has expressed of such an apprehension. The legator, in the above case, had made a Will of his entire property in favour of a person and the insolvent heirs had expressed their consent to it. Their real intention was to prevent the property from going into the possession of the receiver. The High Court accepting the Will valid to the extent of one-third of the property held that the consent of the heirs regarding two-third of the property were invalid and thus two-third of the property went into the possession of the receiver in the case. The consent of a minor is not legally valid. He may, however, give his consent on attaining majority. He may also, on attaining majority, challenge the validity of the Will under the Islamic Law and claim his legal share.^{39e} If the mother of a minor expresses her consent (on behalf of the minor) to the Will made by the legator, the consent to the extent of minor's share shall not be effective.^{39f} The only consent effective is that given after the death of the legator. Hence, for the purposes of a Will, the consent of those heirs (with the condition of their being so capable) shall be essential who are alive at the time of death of the legator, not of those heirs who were present at the time of the creation of Will.

The Courts of Indo-Pak sub-continent have, in accordance with Shi'ah jurisprudence, held that a Shi'ah Muslim can make a Will of one-third of his property in favour of any heir and the Will shall take effect

^{39c}1930 Lahore 695; AIR 1927, Lahore 776.

^{39d}AIR 1920, Allahabad 243.

^{39e}AIR 1932, Privy Council 81; 136 Indian Cases 454.

^{39f}AIR 1933, Qudh 97; 143 Indian Cases 108.

without the consent of the other heirs. If the Will, however, is of more than one-third of the property the obtaining of consent of other heirs shall be essential. According to Shi'ah jurists a consent given either in life or after the death of the legator shall equally be valid.^{39g} But the consent cannot follow an earlier repudiation.^{39h} When a Will is made of the entire legacy in favour of an heir and the other heirs are totally excluded the Will cannot take effect even to the extent of one-third of the legacy.³⁹ⁱ

Section 242. A Will made by the husband in favour of his wife <sup>Will between hus-
band and wife</sup> and by the wife in favour of her husband, in the event of no other heir being present, shall be valid.

Provided that other heir being present, such Will made shall be enforceable by his permission.

COMMENTARY

Marital status too is one of the grounds for inheritance. Will in favour of an heir, though may it be of less than one-third, is not legally valid. It depends upon the permission of the other heirs. Therefore, a Will made by the spouses in favour of each other is considered to be a Will made in favour of an heir. That is why, a Will made by the husband in favour of his wife and by the wife in favour of her husband, being Wills in favour of heirs, depend for their validity upon the permission of the heirs. Such permission validates the Wills, otherwise they become void. It is clear that this rule shall apply when besides the spouses other heirs are also alive; If other heirs are not alive at the time of death of the legator, the Will shall take due effect. No sanction of the Government shall be necessary as the Government enjoys only a residual right. That is to say, the right of the legatee takes precedence over the right of the *Baitul māl* (Government Treasury). The reason for the application of this rule particularly in the case of spouses is that making a Will by the spouses in favour of each other, in the event of other heirs not being alive, is to a certain extent useful. This is so because the spouses are entitled merely to an appointed share in each other's property and because of the rule of exclusion get nothing under

^{39g}AIR 1927, Allahabad 430; 110 Indian Cases 673.

^{39h}AIR 1937, Privy Council 174.

³⁹ⁱAIR 1924, Allahabad 20; 77 Indian Cases 66.

the doctrine of *Radd* in the law of inheritance out of the remaining estate. Hence, in the event of there being no heir, if entitlement by Will is established in favour of the spouses this shall be especially advantageous in securing the whole estate in their favour. As against this, when the Will is made in favour of an heir and no other heir is present, the legatee does not gain any advantage by the Will because this heir (the legatee) in such a situation shall himself, as an heir, receive the entire legacy. If the heir is an '*Asbah* (residuary), e.g. a real brother or a paternal uncle or the close relation of a residuary (for instance, one from the same womb) he shall automatically get the entire estate. If there is a Sharer such as mother or daughter she shall get her fixed share as sharer and also the remainder on the basis of the doctrine of *Radd*, there being no residuary. Hence, Will in favour of such persons shall be of no additional benefit to them.⁴⁰

Section 243. A Will made in favour of one untraceable is valid but the legacy shall be kept in abeyance till the proof of his life or death becomes available.

If the untraced legatee is found alive he shall get the legacy, otherwise the heirs of the lagator shall have their rights in it.

COMMENTARY

An untraced person is one whose being alive or dead is not known. That is to say, he can not either be said to be alive or dead. The relevant law in these cases being different, in some matters he shall be taken to be alive and in some others he shall be taken to be dead. The principle under Islamic law is that in matters which are adverse to the interest of the one untraceable he shall be considered to be alive, and the consequences flowing against him shall be postponed till the proof of his death is available. Thus his property shall neither be distributed among his heirs nor the contract of lease made by him shall be avoided. Rather, considering him to be alive, matters adverse to his interest be allowed to continue as of old till the proof of his death is obtained. But in respect of matters that are in the interest of the untraced person though harmful to others he shall be considered to be dead. On the basis of this principle, any one shall not be the heir of such person. If a Will is made in his favour, the legator is dead and he himself (the legatee) is untraceable, his legacy or his share in inheritance shall be

⁴⁰Zayd al-Abyāni: *Sharh al-Ahkam al-Shar'iyyah*, Cairo, 1920 A.H., vol. ii, p. 281-82.

kept in tact till his being alive or dead is ascertained. If it becomes known that he is alive, he shall get the legacy under the Will or the share in inheritance (as the case may be). If it is not proved that he was alive at the time of death of the ancestor or the legator or he is held to be dead before the death of the (ancestor or the) legator, the heirs of the legator or the ancestor shall be entitled to the (share in the) legacy under the Will. It is based on the rule of *istishāb*. *Istishāb* may be pressed into service for avoiding injury but not acquiring some right and interest. That is to say, the right of someone cannot, under this rule, be created in the property of another, but however, it is possible that someone may be prevented from acquiring right in the property of another under this rule. Thus, it may be concluded that the untraced person is alive so far as his property is concerned and is dead in respect of acquisition of the property of others.

Indeed, when the period fixed, under law for presuming an untraced one alive, has passed and he is declared as dead, the declaration shall take effect from the time when he had become untraceable. It shall not be considered to have taken effect from the date of such declaration.⁴¹

Section 244. A Will made in favour of a murderer who commits a wilful murder or culpable homicide not amounting to murder of the legator is not valid, except when the heirs give permission or the murderer is a child or an insane person.

Exception : The legatee shall not be deprived of the Will in his favour on account of his being an indirect cause of the murder, or the murder is proved to have been caused by mistake.

COMMENTARY

Hanafi View : Among other conditions of the validity of a Will one is that the legatee should not be the murderer of the legator. If he is one, the Will made in his favour shall not remain valid. But every kind of murder is not a bar to get legacy under Will. Only that murder which is wilful or amounts to wilful murder is the cause. It is noted in *Al-mabsūt* and *Bada'i' Al-sanā'i'* that of the qualification concerning legatee an important one is to the effect that the legatee must not have committed murder of the legator unjustly. If that is so, the Will made in his favour shall not be valid. Imam

⁴¹Ibid, p. 350.

Shafi'i's verdict is also to the same effect.⁴² Imam Sarakhsi, on this question has elaborated the assertion of Imam Shafi'i to the effect that if a Will is made previous to the wound inflicted on the legator it shall be void. If the Will, however, is made in his favour, subsequent to the wound has been inflicted on the legator it shall take effect.^{42a}

There is no difference of opinion between the Four Imams that if the killing has been warranted in Shari'ah, such as in *Qisas* (the law of retaliation) or the murderer is a child or the legator is indirectly the cause of murder, the Will shall be valid.^{42b} Besides the other jurists of Maliki School of fiqh, Imam Saḥnūn has said in his book, *Al-Mudawwanatul Kubra* that Will in favour of a murderer in a case of culpable homicide not amounting to murder, shall take effect in the (personal) property of the legator by way of inheritance, but it shall not take effect in the *diyat*, compensation money for man-slaughter (blood-money) received by the heirs. Imam Saḥnūn has further said that, in his view, if the legator remains alive for some days (after being injured) and thereafter makes a Will in favour of one ultimately guilty of man-slaughter the Will shall take effect in each of the two kinds of property belonging to the legator so killed. If the murder is wilful and the legator has made the Will prior to his being murdered the Will in favour of the murderer shall not take effect either in the personal property or in the compensation for man-slaughter (blood-money). If the murdered person after being dealt with a deadly blow remains alive for some time and he comes to know of the murderer, yet he makes a Will in his favour it shall be valid. It shall take effect to the extent of one-third in the personal property of the legator. But if the victim absolves him from the act of committing the offence, the Will shall not remain confined to the personal property of the legator. It shall take effect in all kinds of his properties accruing to him prior to or after his death including the *diyat*.^{42c}

Shafi'i's Rule :

Will in favour of a murderer, according to Hanafis is not valid, provided he himself commits the act of murder, whether wilfully or by mistake. As against this, according to Shafi'is, Will in favour of a murderer is valid. This is, however, the assertion of the author of *Al-Hidayah*.⁴³ Such a Will has

⁴²Al-Kasānī: op. cit., vol. vii, p. 339.

^{42a}Al-Sarakhsi: op. cit., vol. xxvii, pp. 175, 177.

^{42b}Al-Kasānī: op. cit., vol. vii, p. 340.

^{42c}Al-Sahnūn: *Al-Mudawwanatul Kubra*, Cairo, vol. xv, pp. 34-35.

⁴³Al-Marghinanī: op. cit., vol. iv, p. 656.

been described in Bada'i Al-Ṣanai' as invalid; and a distinction between the two situations has been dealt with in 'Almabsūt'. Two verdicts on the situation have been recorded in Shafi'i *fiqh*. One is to the effect that the Will is valid and the other is to the effect that the Will is invalid. Both these view have been given equal weight in 'Al-Muhazzab'.^{43a} Indeed the assertion holding the Will to be valid has been characterised as more evident in 'Mughni Al-Muhtaj Sharah Al-Minhaj'.⁴⁴

Hanbali View : According to Hanbalis as well, Will made in favour of a murderer is not valid although the murder may have been committed by mistake. It is however, stated in *Al-Iqnā'* that if a person inflicts wounds on the legator. The legator, inspite of it, makes a Will in favour of the person who injured him. The legator because of the effect of that wound dies. The Will made by him shall not be void,⁴⁵ because the bar of hastening the process of acquisition of property under Will (by committing murder) is absent, i.e. it can not be said that the legatee, in order to acquire sooner the property under Will, wounded or killed the legator.

Shi'ah View : According to Shi'ah *fiqh* as well the Will in favour of a murderer is not valid.⁴⁶

Hanafis' basis of the rule : The Hanafis analyse this question on the analogy of inheritance and derive this injunction from the Prophet's statement : "No inheritance for the murderer". The murderer is deprived of the inheritance because through that murder he intends to hasten the process of acquisition of the estate. It is a settled rule of the Principles of *fiqh* that the person who strives to acquire property prior to its due time shall be deprived of that property. As the murderer intends to acquire the inheritance prior to the time due he shall be disinherited and similar shall be the mandate regarding a Will.^{46a}

Imam Shafi'i, on the question of debarring a person from inheritance is convinced of the correctness of depriving all murderers of the inheritance. But according to the author of "*Al-Mabsūt*", the Imam is not convinced of the idea of depriving every murderer of the legacy under a Will. The reason assigned by the Imam is that the Will in favour of a murderer

^{43a}Al-Shirazi: op. cit. vol. i, p. 458.

⁴⁴*Al-Mughni al-Muhtāj*, Cairo, vol. iii, p. 43.

⁴⁵Sharafuddin Al-Maqdisi: *Al-Iqnā'*, Cairo, vol. iii, p. 59.

⁴⁶Al-Hilli: op. cit., p. 266.

^{46a}Al-Sarakhsi: *Al-Mabsūt*, vol. vii, p. 177; *Al-Majallah*, Section, 99.

"فالموصى له قصد الاستعجال بفعل مخطور فيعاقب بالحرمان كالاميراث"

"من استعجل الشيء قبل اوانه عوقب بحرمانه"

(on account of his committing murder) is forbidden on the basis of the Prophet's tradition. And such murder shall be the cause of depriving a person only when he commits the murder without any justification. If the murder is committed as a matter of right, for instance, the legatee murders the legator in *Qisās* (retaliation) (or the killing is done in implementation of some order under penal law) the same shall not be the cause of depriving a person of his legacy under the Will. Same will be the case with a child or an insane person. If he commits murder, the Will in his favour shall not be void because of his personal incapacity.

Objection may be raised here that the Prophet's saying, "No Will in favour of or nothing to the murderer" is general in its connotation wherein there is no specific exception; how can the above-stated cases be excepted therefrom? The answer to it is that the statement of the Prophet, in fact, is concerning an unjust killing, which is punishable under the penal law. (Depriving one of the property is a punishment and it is imposed against the act which is unlawful). Besides, punishment is imposed upon a wrong-doer who is legally liable. Hence killing under a right is not unlawful and no order for deprivation from Will or inheritance, in such a case, shall be passed. The reason for getting the legacy, inspite of homicide is therefore the legality of the act and so the exception of one who is not liable legally.^{46b}

In fact, there are two assertions on this question, reported from Imam Shafi'i: one is to the effect that a Will in favour of any kind of murderer shall not be valid and the other is that it shall be so. But we find that similar bar applies to inheritance by way of murdering the ancestor. Hence, a similar principle should apply in respect of bar only when the murder of the ancestor is unjust. According to Shafi'i, however, in case of inheritance without exception, all murders are absolute bars to inheritance. But it must be noted that the said argument has been stated by Imam Sarakhsi in his 'Al-Mabsut'. There is no such argument advanced based on the tradition, "لا وصية لقاتل" recorded in the original books of Shafi'i *fiqh* under study. Nor any reason for this distinction has been assigned therein. The author of "*Mughni Al-Muhtaj*" by stating the two viewpoints has made the verdict regarding the validity of Will as more logically valid.

Where a person is remotely connected, i. e. the person who himself has not committed the murder nor is he an accomplice of the murderer but nevertheless may be a remote cause of the murder, he shall not be deprived of the legacy under the victim's Will,^{46c} because he is really not a murderer. For

^{46b} *Al-Mughni al-Muhtāj*, vol. iii, p. 43; *Al-Shirazi*: op. cit., vol. i, p. 458.

^{46c} *Al-Kasani*: op. cit., vol. vii, p. 340.

instance, a person digs a well upon his own land. Someone falls into it and dies. The one who digs the well cannot be held responsible for murdering the same way as one who commits murder directly is held responsible for it. It is evident from this that by mere creation of a situation one does not become the real murderer. As he is not the real murderer, the punishment of his being deprived of legally under the Will shall not apply to him.

Children and insane persons stand exempted from the operation of this rule, because the bar to get the legacy is the punishment for doing what is forbidden. These two categories of persons are not answerable for their actions because they, on account of being minor and insane, are not legally liable. A Will in favour of a child or insane person shall, even in such event, stand as valid.^{46d}

Maliki View :

If the legator knows at the time of creating the Will that the legatee is the cause of the murderous attack on him and, inspite of such knowledge, he makes a Will in his favour, it shall be valid provided that the said act of the legatee is by mistake. Unless homicide is wilful the Will shall be valid only to the extent of the personal property of the legator; it shall not, however, be valid in blood-money. If the legator does not know at the time of making a Will that the legatee is the murderer and makes the Will, in such cases there are two reported opinions : according to one it shall be valid whereas according to the other it shall be void.⁴⁷ There could be found no preference attached to any of the views in Maliki *fiqh*. According to this writer, in such a case, the murderer should get no property under the Will and the second assertion should be held to be preferable.

Shafi'i View :

There are different verdicts reported by Imam Shafi'i regarding a Will made in favour of a murderer. The first assertion is to the effect that it is invalid, because the right to property under Will is created on death and the murder bars that right as it does in case of inheritance. Hence, it shall be an impediment to the Will as well. The other opinion is to the effect that the Will is valid.⁴⁸ It seems, according to this writer, that the first view be held preferable logically.

^{46d}Al-Sarakhsi: op. cit. vol. xxvii, p. 177.

⁴⁷Al-Saḥnūn : op. cit., vol. xv, pp. 34-35; Al-Ābi: op. cit., vol. ii, pp. 317-18.

⁴⁸Al-Firozabadi: *Al-Muhadhdhab*, Cairo, vol. i, p. 458; *Al-Mughni al-Muhtāj*, Cairo, 1958, vol. iii, p. 43.

Modern Legislation :

Egyptian Law : Under Qanūn al-Wasiyyat, 1946, it is stated that the intentional murder of the legator or the ancestor without good reason or just cause whether the murder is committed by the murderer himself or he is an accomplice of the murderer or he gives false evidence on account of which a death sentence is passed against the legator or the ancestor, shall be an impediment or the bar absolute to the entitlement of optional and compulsory Will, where the murderer is discreet, adult being fifteen years of age and is considered to have acted without any legal excuse.

Syrian Law : It is stated in Section 223 of *Qanūn al-Ahwal al-Shakhsiyyah* that matters as noted below shall be deemed as impediment or bar to the optional as well as compulsory Wills :

- (a) Murder of the legator by the legatee, whether it is committed by him personally or he is an accomplice of the actual murderer. The murder is committed without any right or justifiable cause by the murderer who is of fifteen years of age and is presumed to be discreet and adult.
- (b) Legatee being the cause of legator's murder i.e. even where legatee's false evidence against the legator may have resulted in his being sentenced to death.

Tunisian Law : Under Tunisian Law, the Will in favour of murderer of the legator is forbidden. Accordingly, it has been said in the Tunisian *Majallah Al-Ahwal Al-Shakhsiyyah* that optional Will as well as compulsory Will shall remain ineffective on the ground of the legatee wilfully murdering or becoming the cause of the murder of the legator, whether the legatee commits the murder himself or is an accomplice in the committal of the murder or is the cause of someone else becoming an accomplice or he gives false evidence on account of which the Qazi passes a sentence of death against the legator. This shall be so when the murder has been committed without legal cause and the one who commits murder is discreet and has attained the minimum age of thirteen years.

Section 245. Will in favour of a child in the womb is valid, subject to the following conditions :—

In case of the pregnant woman's husband being alive, it shall be a condition for the entitlement that the child is delivered within six months of the death of the legator. If the pregnant woman has already been irrevocably

divorced or is a widow whose husband has already died, the ultimate period of the delivery of the child shall be of two years from the date of divorce by or death of her husband, provided that the woman has not affirmed earlier the expiry of her period of 'iddat (probation or waiting).

COMMENTARY

According to Hanafis a Will made in favour of a child in womb is valid, provided the child is delivered within six months of the making of Will,⁴⁹ so that the irrefutable proof exists that the mother was pregnant at the time of making of Will.⁵⁰ But there is an exception to this rule as follows. If the woman is a divorcee or a widow and is pregnant, in that case, if the child is born within two years of the death of or after divorce given by him, the Will shall then be held to be duly enforceable. In case a Will is made in favour of a child in the womb of a pregnant woman whose husband is alive and the child in womb is not delivered within six months from the time making the will, the child then shall not be entitled to the property in Will. The basis of this viewpoint is the rule of inheritance. As a child in the womb may inherit as an heir he may, as well, acquire property through Will.

If two or more children are born simultaneously the property under Will shall be divided among them equally. If any one of them, after having being born alive dies, his share in the Will shall be divided among his heirs according to law of inheritance, because he prior to his death had actually become entitled to it, the legacy shall be considered to be the estate of that deceased child. If one child is born alive and the other is born dead, the entire legacy shall go to the child born alive.

Maliki View : An absolute qualification of the legatee is that he must have the capacity of becoming an owner of the legacy. This is so irrespective of whether the legatee is generally a class or is a particular individual. The legatee must be capable of becoming an owner *defacto* or *de jure*, such as a person or an institution. A mosque or an inn possesses the capability of acquiring ownership under the law. The offering of prayers in mosque by the devotees and staying in the inn by the travellers give these institutions the right of ownership under the Shari'ah. Similarly, if the pregnancy is a proved one or delivery be expected a Will made in favour of the child shall be valid. On the child being born alive the Will made in its favour shall be put into effect. The condition for the Will made during pregnancy is that

⁴⁹Kamila Tayyebji: Limited Interest in Muhammadan Law, London, 1949, p. 87.

⁵⁰Al-Kasani : op. cit., vol. vii, pp. 335, 347; Al-Sarakhsi: op. cit., vol. xxvii, p. 86. (For discussion on period of gestation, see vol. i, pp. 693-708)

the child must be born alive. If the child, at the time of being born, utters a cry it shall be considered to be alive and shall be held to be the legatee. If the child does not utter a cry it shall be considered to be dead and the Will made in his favour shall be void.

In the event of Will made in favour of child in the womb, if the woman has multiple delivery the property under Will shall be divided, among all the children equally irrespective of their sex, except where the legator has made it clear that the division of the property shall be made in accordance with their share in inheritance,⁵¹ or has indicated otherwise.

Shafi'i View :

The existence of the legatee is essential. No Will in favour of a dead person shall be valid as no gift in favour of a dead person is valid. If a Will is made in favour of a child in the womb of any woman other than the legator's wife, and the pregnancy is a certainty at the time and the child is delivered in six months of the time of making the Will, although the marriage relationship had ended, the Will shall be valid, because when such a child in pregnancy is entitled to inheritance he will as well be entitled under Will. If the child, however, is born during the continuance of the marriage relationship after the lapse of six months of the making of the Will he shall not be valid in as much as there is, in such a case, likelihood that the pregnancy might have taken place after the making of the Will. Such a Will, in doubtful circumstances, shall not be held valid.⁵²

Hanbali View :

Will made in favour of a child in pregnancy shall be valid; for instance when a child is born in less than six months from the time of the making of Will. When the relationship of husband and wife between the couple has ended or the relationship of husband and wife continues, but husband's cohabiting with the wife is not possible, for instance, he is at a far off place, or is suffering from such a disease that his cohabiting with the wife is not possible, or he is in prison, or his heirs have the knowledge that the husband has not cohabited with the wife, or the heirs affirm that the Will, in case of the birth of the child in less than four years, shall be considered to be valid,

If the child is born dead the Will shall be void. If the child is born after divorce by imprecation or relinquishment of the claim of paternity the

⁵¹ Al-Ābi: op. cit., vol. ii, p. 317; Al-Saḥnūn: op. cit., vol. xv, p. 25.

⁵² Al-Shafi'i: *Kitāb al-Umm*, vol. iv, p. 112; Al-Firozabadi, *Al-Muḥadḍḥab*, vol. i, p. 458.

Will shall not be valid. In case of a Will in favour of child in pregnancy, a boy or a girl, shall be on equal footing in receiving share under the Will. If the legator himself indicates the proportion between the share of the boy and the girl it shall be acted upon in accordance with the same. A Will in favour of uncertain, unknown and non-existent person shall not be valid.⁵³

Shi'ah View :

A Will in favour of a child in womb according to Shi'ah Imamiyah as well, shall be valid when the child is born within six months from the time of the making of Will. If the child is born in more than that period the Will shall not be valid. A Will in favour of a child conceived and existing shall be valid, provided it is born alive. If it is born dead the Will shall become void. If after being born alive the child dies the property under Will shall belong to the heirs of the child as inheritance.⁵⁴

Modern Legislation :

Egyptian Law :

Section 35. A Will made in favour of a child in womb shall be valid under the following conditions :—

1. When the legator at the time of making the Will admits the pregnancy and the child is born alive within a solar year (365 days) or less from the time of making the Will.

2. When the legator has not admitted the pregnancy and the child is born at the most within nine months (270 days) from the time of making the Will, provided the woman is not observing her term of probation in consequence of death of or irrevocable divorce by her husband, or in the event of the woman observing term of probation in consequence thereof, the child may have been born alive within 365 days or less.

When the Will is made in favour of a pregnancy from a particular person the condition for its validity shall be that the paternity of the child should be an established one from that particular person.

The share of the legatee in the estate shall be kept in reserve till delivery.

Section 36. When a pregnant woman gives birth, at a time or at different times of interval of less than six months, to two or more children, the property under Will shall be divided equally between them except when

⁵³Sharafuddin Al-Maqdisi, *Al-Iqnā'*, Cairo, vol. iii, p. 58; Al-Kharqi: *Al-Mukhtasar*, p. 113.

⁵⁴Al-Hilli; *op. cit.*, pp. 261, 263.

it is provided to the contrary in the Will. When one out of two children is born alive and the other dead, the entire property under Will shall go to the child born alive. If one of the two children dies after its birth his share under the Will shall go to his heirs. If the legator has made a Will respecting usufructs of property, the heirs of the legator shall be entitled to the corpus.⁵⁵

Tunisian Law :

Section 184. A Will in favour of a child in womb shall be valid provided the pregnancy exists at the time of making the Will and the child is born alive within the period fixed under Chapter XXXV.

After the death of the legator the share in the income from the legacy regarding a child in womb shall be kept in reserve till the child is born.⁵⁶

Syrian Law :

Section 136. (1) Subject to the provisions noted below a Will made in favour of an established pregnancy shall be valid :

- (a) When the legator at the time of making the Will admits the existence of the pregnancy; but the condition shall be that the child is born alive within the period of one year or less from the time of such admission.
- (b) When the pregnant woman is observing her term of probation in consequence of death of, or irrevocable divorce by, her husband the condition shall be that the child is born alive within one year from the time of the start of the term of probation.
- (c) When the legator has not admitted the existence of pregnancy and the pregnant woman is not observing her term of probation, the condition shall be that the child is born alive in nine or less than nine months from the time of the making of Will.
- (d) When the Will is made in favour of a particular person's child in womb there shall also be a condition, in addition to the aforesaid conditions that the pregnancy be duly established one from that person.

(2) The share in the legacy shall be kept in reserve till the child is born so that the same may be given to him after its birth.

⁵⁵Qanūn al-Wasiyyat, 1946.

⁵⁶Majallatul Ahwāl al-Shakhsiyyah, Tunis.

Section 327. (1) When a pregnant woman at one time, or at two different times with the interval of six months, gives birth to two or more than two living children, the property under Will shall be divided equally between them except where the Will provides to the contrary.

(2) If one child is born dead and the other child is born alive the entire legacy shall belong to the child born alive.

(3) If the Will is in respect of a particular property, in the event of the child dying after birth, his share shall be divided among his heirs. If the Will is in respect of usufructs the equivalent of his share in the usufruct till his death, shall belong to the heirs of that child and the corpus of the property after death of the child shall belong to the heirs of the legator.⁵⁷

Pakistan Rulings :

In the case of *Chunnu Bibi vs. Mohammad Riaz*, S. A. Rahman and Shabbir Ahmed JJ., held that, "the Muslim Law contains two rules about the existence of the legatee in order that he may benefit from the Will; one being that he must be in existence at the time of the making of the Will either actually or presumably, the presumed existence meaning birth within six months of the Will; and the other that he should be in existence at the time of the death of the testator. At first sight there appears to be substance in the contention of the learned counsel for the appellant that the two rules are irreconcilable, but a careful consideration reveals that the two rules deal with two different sets of circumstances and are completely reconcilable with each other."

The Judges further held that, "Under the Muslim Law as in other laws a Will ordinarily becomes operative from the moment of the death of the testator and it is for that reason that a Will of a Muslim that the children of so and so will get such and such property, becomes operative from the death of the testator, subject to the condition that the Will or any part of it is not invalid for any reason."

"In the above case the Will was not in favour of a foetus but in that of any child of the testator's daughter that may be born to her, and the condition of birth of the legatee within six months of the bequest being inapplicable, the Will was operative in favour of Muhammad Riaz respondent as he was born before the death of the testator. Muslim Law of succession having become applicable to the estate of Shah Wali from the date of West Punjab Muslim Personal Law (Shari'at) Application Act, 1948, which received the assent of the Governor General of Pakistan, i.e., the 15th of

⁵⁷ Qanūn al-Aḥwāl al-Shakhsīyyah, Syria 1953.

March 1948, the Will of Shah Wali could not affect more than one-third of his property because under the Muslim Law it is only with regard to one-third of the testator's property that a Will is valid and as Muhammad Riaz is not, under the Muslim Law, an heir to the estate of his maternal grandfather, the bequest, which would have been void if he were an heir, suffers from no effect on that ground."⁵⁸

⁵⁸PLD 1956, Lahore, 786.

CHAPTER XXXI

THE LEGACY—(The property bequeathed)

Section 246. It is essential for a legacy to be valuable property or an asset annexed to property or derived from property or amounting to property, acceptable as such under Shari'ah and should belong to the legator.

Conditions for
legacy

COMMENTARY

The basic condition for legacy is that the legacy should be a valuable property (*Mal Mutaqawwam*) or an asset attached to property in as much as the intention is to make someone else the owner of a property or of an asset annexed to property through Will. It is also axiomatic that only property can properly be the subject of ownership. On this basis a Will respecting a dead body or blood is not valid because these articles according to *fiqh*, are not properties. Similarly, the hide of a dead animal before tanning is also not a property. Blood, wine, corpses and hog are declared unlawful things by the Qur'an.

For a property it is also essential that it ought to be valuable in the eye of Shari'ah. Will regarding wine, therefore, shall not be valid because it is not a valuable property for a Muslim; hence it shall not be valid. The Will regarding wine by a non-Muslim citizen of an Islamic country in favour of an infidel shall, however, be valid because for them it is valuable property. A Will made of a trained hunter dog shall, indeed, be valid because, according to Muslim jurists, it is property; its sale or gift, because of this, is valid and accordingly the one who kills it is held liable to pay damages to its owner.¹

We thus conclude that Will made of a property, which under the Shari'ah is held as property and legally belongs to the legator, is valid. The Four Imams are agreed on this point.

Shi'ah fiqh :

According to Shi'ah jurists too, a Will made regarding both the property and its usufructs, if not forbidden by Shari'ah, is valid and

¹Al-Kasani: *Bada'i' al-Sanā'i'*, Cairo, vol. vii, p. 352; Damād Āfandi: *Majma' al-Anhur*, Cairo, vol. ii, p. 691.

enforceable. Hence a Will made regarding wine, hog, and biting dogs shall not be valid, nor the Will regarding property yielding no profits (of no use) shall be valid.²

Modern Legislation :

Egyptian Law :

Section 10. It is essential for the legacy that :—

- (a) It be a property open to succession or could be subject matter of contract during the lifetime of the legator.
- (b) It is considered valuable by the legator.
- (c) If it is an ascertained property it should be under the ownership of the legator at the time of making the Will.

Section 11. A Will made regarding the right of getting premises vacated, and inheritable rights including income of hired properties, accruing after the death of legator shall be valid.

Section 12. A Will regarding lending to the extent of one-third out of the estate of the deceased shall also be valid. But such Will for more than one-third shall depend upon the permission of the heirs.

Section 13. A Will for the division of the estate in favour of the legator's heirs shall be valid to the extent of the share to which they would have been entitled in case of inheritance and it shall be put into effect after the death of the legator. For the property exceeding one's legal share, rules regarding Wills shall apply.³

Tunisian Law :

Section 186. If the legacy is in respect of specified property the condition is that it be, at the time of making the Will, in the ownership of the legator.⁴

Syrian Law :

Section 216. The conditions for legacy are as under :

- (a) That the legacy is valuable property and is transferable after the death of the legator.

²Al-Hilli: *Sharā'i' al-Islām*, Beirut, vol. ii, p. 259.

³*Qanūn al-Wasiyyat*, Egypt, 1946.

⁴*Majallatul Ahwāl al-Shakhsiyyah*, Chapter on Al-Wasiyyah, Tunis, 1957.

- (b) If the corpus of the property is specified it should be, at the time of making the Will, in the ownership of the legator.

Section 217. A Will regarding all such rights that are transferable by inheritance shall be valid. The rights and profits, accruing from tenancy after the death of the legator, is also included in such rights.⁵ (i.e. this right of occupation of the property or letting it out on rent too is transferable through Will).

Section 247. A will, after meeting out the burial expenses of the legator and after payment of all his debts, quantum of the legacy made to the extent of one-third of the remaining estate shall be valid. Execution of the Will made for more than one-third of the estate, if so made by the legator, shall depend upon the permission of the heirs, expressed after the death of the legator.

COMMENTARY

Hanafi Law :

In the event of an heir of the deceased legator being alive the extent of legacy should not be of more than one-third of the estate. The Will regarding more than one-third (to the extent of the excess) shall depend upon the permission of the heir who is competent to give such permission. Competency comprises of discretion and maturity. If the heir is insane or a minor, or lacks in discretion his permission shall not be reliable. But even if discreet and mature, the heir is suffering from death-illness and gives permission during his death-illness, rules governing a Will shall apply to his permission and it shall be considered to have originated from him.

That kind of permission of the heir is valid which is given after the death of the legator. Permission given during the lifetime of the legator shall not be acceptable. If the permission is given during the lifetime of the legator and then, after the death of the legator, it is revoked, the revocation shall be valid.⁶

If a Will is made in respect of several matters it shall have to be determined whether a third of the estate is sufficient to cover all the items under the Will. If it is sufficient to cover all the matters the entire Will shall be executable. If the one-third quantum does not cover all the matters

⁵Qanūn al-Aḥwāl al-Shakhsiyyah, Syria, 1953.

⁶Al-Kasāni: op. cit., vol. vii, p. 370.

under the Will, in that event, it shall have to be seen whether the entire Will is in respect of public purposes or some part of it is in respect of public purposes and some part of it is in respect of personal rights. If the entire Will is in respect of public purposes it shall have to be determined whether the purposes can be described as ordained and prescribed ones or are merely supererogatory or a mixture of both kinds of purposes. If, however, the purposes of the Will be equal in virtue, according to religious dictates, the Will shall be executed in the order directed by the legator. In this connection there is found some disagreement among the Hanafi Imams on some minor points. For instance, as between "*Haj*" (pilgrimage) and "*Zakat*" (prescribed alms) which should get precedence? According to one view of Imam Abu Yusuf, '*Haj*' gets precedence, but according to another of his '*Zakā'i*' should get preference. Imam Muhammad al-Shaybani, agrees with the second that '*Zakā'i*' should get precedence. This writer considers the viewpoint of Imam Muhammad that Zakat should get precedence over pilgrimage (*Haj*) more reasonable and preferable, because '*Haj*' is a duty that concerns directly the legator and his Lord, whereas '*Zakat*' (which is obligatory to pay) is, though, primarily an ordained purpose yet people's right is also involved into it at the same time, which, in the Qur'anic words is "*حق معلوم للسائل والمحروم*" a right benefitting the beggars and the non-haves. Hence, '*Zakat*' should get precedence over '*Haj*'.

Great emphasis is laid on community's right because its non-fulfilment occasions harm to others. However, the principle is that ordained (*Farḍ*) purposes shall get precedence over prescribed ones, i.e. *Wājibat* and the latter shall get preference over acts supererogatory.

If the Will concerns the rights of the individuals and it can get executed in its entirety in one-third of the estate, no question of precedence or otherwise arises. If, however, one-third of the property is not enough to cover the bequest to all the legatees (for instance, the legator bequeaths one-third in favour of one person, one-fourth in favour of another person and one-sixth in favour of a third person) in such an event the one-third quantum of the estate shall be proportionately distributed among them.

If the legacy is a defined property, the legatee shall become its owner and he shall be entitled to take all proprietary use of it, whether it be in the shape of gaining profits from that property, or it be in the shape of making

⁷Ibid, pp. 371-73.

The fixation of the quantum, a third of the estate or more, shall be made at the time of the Will being put into execution. No reference for that purpose shall be made to the time of the death of the legator. According to Imam Malik the Will for more than one-third is, in no event, valid whether or not the heirs are existing.¹⁵

Shafi'i View :

If the Will relates to *huquq al-'ibad* or *huquq Allah* or is for prescribed charities or pilgrimage to Mecca, the limit of one-third shall be disregarded because even if they are not specifically mentioned in the Will, the spending on them is obligatory from the legacy as payment of legator's debts. The second argument is that the restrictions to more than one-third quantum on making the Will is with a view that the rights of the heirs may not be affected. But, when the deceased is under a debt, the heirs have no title in the property of the deceased till the payment of the debt. Therefore, the restriction of one-third shall not be applicable here. However, according to Shafi'i, if the legator specifies in his Will the one-third of the property from which those rights shall be met, in such a case, these expenses shall be so met. It becomes obvious from such specification that the legator intends not to deprive the heirs of their shares.¹⁶ According to this writer, there seems to be a discrepancy in the arguments of Imam Shafi'i. If the prescribed charity is considered at par with debt the fixing of the limit of one-third through Will becomes meaningless whether or not the prescribed charity amounts to more than one-third of the legacy, otherwise the limit of one-third shall be maintained in the Will.

However, according to Shafi'i *fiqh* as well, the Will may be made to the extent of one-third of the estate. If the Will is made of more than one-third of the estate and the heirs of the legator are not alive, the Will regarding the property in excess of one-third shall be void because Muslims in general have their rights in the property exceeding one-third, in the absence of the heirs; no one has the authority to give permission for the excess on behalf of the Muslim Community. The Will, therefore, shall be held to be void. If, however, the heirs of the legator are present how will the case be decided? There are two views reported. One is to the effect that the Will regarding

¹⁵Al-Ābi: op. cit., vol. ii, p. 318; Al-Zarqānī: op. cit., vol. iv, p. 471; Ibn Rushd: op. cit., vol. ii, p. 336.

¹⁶Al-Firozabadi: op. cit., vol. i, p. 460.

more than one-third of the property shall be void because the Prophet (peace be on him), had forbidden his Companion, Sa'd b. Abi Waqqāṣ from making a Will regarding more than one-third of his property. And this prohibition denotes that Will regarding excess shall be void. The other view is that a Will in respect of excess made dependent upon the permission of the heirs shall be valid. If the heirs give permission it shall be put into effect. If they do not give permission it shall become void. On the basis of the first view (i.e. on the basis of the Will regarding excess being void) the permission of the heirs shall on their behalf be considered to constitute as gift from its inception; hence the case shall need compliance with all the ingredients of gift i.e. proposal, acceptance and delivery of possession. On the basis of the other view (i.e. on the basis of the Will being valid) the permission of the heirs shall be the permission of the legator's act being put into execution, and accordingly executed.¹⁷ On reference to several standard Shafi'i works, the conclusion is that the first view is preferred i.e. the permission of the heirs is a conferment of the new proprietary right which, on their behalf, is a gift.

It has already been indicated above that there is difference among the Shafi'i 'Ulema' on the fixation of the quantum on one-third. One group maintains that it shall be formed of one-third of the entire property that exists at the time of making the Will, in as much as the Will is a covenant that requires existence of the property. Hence the property that exists at the time of making the covenant of Will shall be relied upon. It, therefore, follows that if at the time of making the Will there is no property, but after the Will has been made a property is acquired at the time of death (of the legator) the Will shall have no concern with the said property. The assertion of the other group is that one-third of that property shall be taken into account which exists at the time of the death of the legator in as much as this is the time of the creation of rights under Will and its becoming effective.¹⁸ This assertion is correct and is supported by jurists.

If the legacy pertains to matters of general welfare, as a Will for charitable purposes, for making reduction in sale price of some property in favour of the legatee it shall all take effect to the extent of one-third, whether the Will is made in sound health or in death-illness or partly in sound health and partly death-sickness, because all such Wills become

¹⁷Ibid, p. 457; Al-Shafi'i: *Kitab al-Umm*, Cairo, vol. iv, p. 457.

¹⁸Ibid.

effective after the death. It is obvious that whatever transfers are put into effect by the legator in his lifetime in the state of sound health, they shall take effect regarding all that entire property as he has absolute right at that time in that property. But if they have been executed in the state of ill-health, though not in the state of death-illness, even then they shall be deemed as effective as those in the state of sound health. But, if they have been effected during death-illness and the illness continues till the time of death, the Will would take effect to the extent of one-third of the property. This is inferred from the same tradition wherein it is stated that 'a person at the time of his death freed six slaves who formed his entire property. The Prophet (peace be upon him) after drawing lots ordered only two slaves to be freed and four of them to remain slaves as of old'. However, if the person suffering from death-illness recovers, the limitation of one-third shall not be pressed into service in case he puts the said acts of transfer into effect in his lifetime. It will then be evident that no one has any concern with his property. However, if a person makes a gift in his state of sound health but the transfer of possession of the property under the gift is to take place after his death, the gift and the taking over possession of the property shall be governed by the law of Will and the gift shall be valid merely to the extent of one-third of the estate.

Hanbali View :

Under the Hanbali law as well, the legacy for more than one-third of the estate shall not be valid except when the heirs so permit. In the event of there being no heir, the Will may be made regarding the entire property. In the event of the heirs being present (according to a report from 'Ali), it is desirable that a Will be made regarding one-fifth of the property.¹⁹

According to Hanbali jurists, whatever obligations remain due against the deceased, for instance, debts, obligatory pilgrimage to Mecca (*Haj*), or expiatory charity, expenditure on all of them shall be met with from the property of the deceased. Thereafter, the expenditure on supererogatory matters shall be defrayed. If the property of the deceased is not enough to cover all due obligations the expenditure on those obligations shall be met proportionately. These obligations are to be discharged by the executor or the heirs of the deceased. If none of them is present they are to be discharged by an official of the State. If the obligations are discharged by

¹⁹Umar Ibn al-Husain al-Kharqi: *Al-Mukhtaṣar*, Cairo, p. 111; Sharaf-uddin Al-Maqdisi: op. cit., vol. iii, pp. 48-49.

a person who is not an executor, they shall still be valid. He shall be considered to have so acted by the (implied) permission of the official (of the State). If the legator makes a Will saying that the dues be paid off from the one-third of his property and that be found insufficient to cover the dues, then they shall be discharged of that one-third with an addition from remainder of the estate to that extent. If alongwith those dues there is a Will by the legator for gratuitous payments and after those dues are paid off there is some property left over, the Will regarding giving gratuitously shall be duly executed, otherwise the said Will for gratuitous payments shall be void.²⁰

Shi'ah Law :

According to Shi'ah jurists, if the Will is made regarding more than one-third of the property and there is no heir, the Will regarding the excess property shall be void, because other Muslims, in general, have their rights in that excess property, and no one on behalf of them has the right of assenting to the Will exceeding one-third of the estate. If a Will of more than one-third property is made and the heirs are present, there are two opinions reported from Shi'ah jurists about it: one is that a Will made regarding more than one-third of the property shall be held to be void because the Prophet had forbidden Sa'd b. Abi Waqqāṣ from making Will regarding more than one-third of his property; and the other is that the Will made regarding more than one-third of the property shall be valid if the heirs so permit, otherwise not.

According to Shi'ah jurists as well, the Will ought to be made to the extent of one-third of the property. It should not exceed that limit. It may very well be of less than a third. If the Will is made of more than one-third of the property, the Will regarding the excess shall be void, except when the heirs permit it. Of the heirs, if some permit the Will in the excess and some do not, in such an event, the Will shall take effect merely to the extent of the shares of the permitting heirs.

The permission of the heirs which is given after the death of the legator shall be relied upon. If the relevant permission is given in the lifetime of the legator there are two reports governing the case. According to the more well known view, it is essential for the heir to give affect to it. It shall,

²⁰Sharafuddin Al-Maqdisi: op. cit., vol. iii, p. 56; Abul Barkāt; *Al-Muḥarrar fil Fiqh al-Ḥanbali*, vol. i, p. 381.

however, not be considered to be initially a gift and the making over possession over the legacy shall not be essential (for giving validity to it). If the conditions laid down by the legator in the Will are not illegal, it shall be obligatory to act upon them. The one-third quantum shall be taken into account with reference to the time of the death and not to the time of making the Will.

If the legator has made a Will regarding both obligatory and non-obligatory matters and if the one-third of the legacy is sufficient to cover both of them it shall be put into effect as a whole. If the one-third is insufficient and the heirs have not given their permission, then that part of the Will which is obligatory shall first be met out of the legacy. Thereafter, other legatees shall be paid off from the residue of the one-third till the quantum is exhausted.²¹

Zahiri's Practice :

Abū Muhammad b. Ḥazm, Imam of the Zāhiri *fiqh*, writes in his book, *Al-Muḥallā* that a Will made regarding more than one-third is not valid whether or not the heirs of the legator are present and whether or not they give the permission, because a Will made regarding more than one-third has clearly been prohibited by the traditions of the Holy Prophet (relating to Sa'd). Moreover, the matter is clarified by the *Hadīth*, wherein the Prophet held only two of the slaves free (being the subject of Will), after drawing lot and held the rest of the four slaves to be the estate of the legator heritable by heirs. As regards the quantum of one-third, Ibn Ḥazm writes that if a person makes a Will regarding more than one-third and thereafter his property increases, the Will shall take effect regarding one-third of his original property, (there shall be given no consideration to the increase) and the covenant of Will shall in no way be affected by the increase. Indeed, the legator (in the event of increase in the property) may make a (fresh) Will.

If a person makes a Will of more than one-third of his (known) property and he has as well some property about which he did not know, even if the quantum of his unknown property and that of the known property taken together cover the entire Will, the Will, in that event too, shall take effect regarding one-third of the known property only. Whatever shall exceed this in the covenant of Will shall in any case be void. However, if the Will is made with such words that cover all types of properties, for

²¹Al-Hilli: op. cit., pp. 259-60.

instance, it is said, "Whatever properties God gives me, I make a Will of so much of it or whatever properties I leave behind after my death I make a Will of so much property therefrom" then the Will, after the legator's death, shall take effect only regarding one-third of the entire property that he leaves behind, whether it be made up of both the known and unknown properties.²²

Modern Legislation :

Iraqi Law :

Section 70. A Will for more than one-third is not valid except when the heirs give their consent to it. When there is no heir the State shall act as the heir.²³

Tunisian Law :

Section 187. A Will in favour of non-heir shall take effect regarding one-third of the property only without the consent of the heirs.

Section 190. The Will of a property to a particular and limited extent, can not be valid for more than one-third of the estate, except when the heirs give their consent.²⁴

Indo-Pakistan Rulings :

The viewpoint of the courts of Indo-Pakistan sub-continent from the very beginning has been that the limit of a Will is one-third of the estate and that be executed after meeting out the burial expenses and paying off debts against the deceased. Hence a Muslim cannot make a Will for more than one-third of the estate that remains after meeting out the burial expenses and payment of debts.^{24a}

A Will in favour of a stranger for more than one-third of the legacy shall not be valid.²⁵

A Will for more than one-third shall not be effective except when the heirs after the death of the legator give their consent to it.^{25a}

²²Ibn Hazm: op. cit., vol. vi, pp. 390-392.

²³*Qanun al-Wasiyyat*, Iraq, 1959.

²⁴*Qanun al-Wasiyyat*, Tunis, 1957.

^{24a}PLD 1967, S.C. 200; PLD 1956, Lahore, 786.

²⁵PLD 1958, Karachi, 420.

^{25a}PLD 1966, Peshawar, 147; AIR 1927, Allahabad, 340; AIR 1964, Karala, 200.

If a Will is made for more than one-third in favour of a stranger, the Will shall take effect to the extent of one-third without the consent of the heirs. Indeed the Will for more than one-third shall take effect when the heirs express their consent to it. The consent shall be governed by the same conditions that apply when the Will is made in favour of an heir and other heirs give their consent to it.^{25b}

Here the point must be kept in view that the right of objection belongs to a Muslim heir. When there is no heir, the legatee is entitled to the entire legacy.^{25c}

Section 248. A person who has no heir is entitled to make a Will regarding his entire property in favour of any person he desires.

COMMENTARY

The rationale for fixing the quantum of one-third in Will making is that the rights of heirs may not be adversely affected. Hence, if there are no heirs at the time of legator's death, the Will for more than one-third, even for the entire property shall also be valid.

If the Will has not been made regarding the entire property, the residue of the property, after the payments of debts and execution of Will, shall belong to the public treasury.²⁶ This is the Hanafi rule.

The Malkis,²⁷ Shafi'is²⁸ and Hanbalis,²⁹ are, in all circumstances, against the making of Will for more than one-third. According to them, the rest two-third of the legacy, in case of there being no heir, shall belong to the public treasury.

Modern Legislation :

Tunisian law :

Section 188. The Will of a person who is not under a debt and has no heir shall take effect regarding his entire property. The public treasury shall have no claim over it.³⁰

^{25b}PLD 1958, Karachi, 420; AIR 1921, Sind, 177; AIR 1918, Privy Council, 137.

^{25c}PLD 1963, Supreme Court, 553.

²⁶Qadri Pasha: *Ahkām al-Shari'yyah*, Cairo, 1895, Section, 534.

²⁷Al-Ābi: op. cit., vol. ii, p. 318.

²⁸Al-Firozabadi: op. cit., vol. i, p. 457.

²⁹Al-Ābi: op. cit., vol. ii, p. 318.

³⁰*Qanun al-Wasiyyat*, Tunis, 1957.

Section 249. A Will made regarding usufructs permanently or for a fixed period, shall be valid.

COMMENTARY

Generally, It is intended through a Will to make someone the proprietor of the corpus of property. But sometimes a Will is made only to the extent of realising benefits from the property.

Hanafi Law :

According to Hanafi *fiqh* the Will regarding *usufructs* or user is valid in the same way as the Will for a certain *corpus* of property itself. Hence the legacy may either be the precise property or the user and usufructs of the property: both shall be equally valid.³¹ The basis of the rule is that the usufructs of a property is a corpus subject to Will as the property itself.³² Will regarding usufruct can also be limited by time. For instance, a person may make a Will to the effect that a certain person shall live in his house for one year or for one month.³³ If the Will regarding usufructs or of user is made without the fixation of time it shall be considered to subsist during the lifetime of the legatee. Thereafter, it shall be the property of the heirs of the legator except when the Will has been made in favour of some other person after the first one.

If a person makes a Will regarding the right of residence in his house or regarding the realisation of its income permanently without fixation of time in favour of someone, the legatee shall have the right of use of the house by residing therein or by realising its income till his own lifetime. After the death of the legatee, however, the right of the residence in the house and the realisation of its income shall get transferred to the heirs of the legator. If the Will is made for a fixed period the right of use shall exist during that fixed period. If the Will is made with the word 'years' (without fixings its number) it shall mean three years.³⁴ If a period is fixed for the enjoyment of usufruct, benefit or user and the legatee dies before the expiration of that period, the right of realising such enjoyment shall get transferred to the heirs of the legatee, which right, after the expiration of the fixed period,

³¹ Zayd al-Abyāni: op. cit., vol. ii, pp. 269, 274.

³² Al-Kasani: op. cit., vol. vii, p. 352.

³³ Ibid.

³⁴ Qadri Pasha: op. cit., Section 553; Zayd al-Abyani, vol. ii, p. 309.

shall be considered to have terminated. If a person makes a Will regarding residence in his house, or regarding income from certain land, in favour of a person permanently as specified in the Will, in such events the legatee shall take use of the legacy till his lifetime. After his death the benefit shall get transferred to the heirs of the legatee. If the period is not fixed and the words of 'a few years' are used, the legatee shall have the right of enjoyment for three years. Indeed if there is no specification regarding the period, the legatee shall be entitled to take use of it during his lifetime.³⁵

It is, in this connection, necessary to specify that a person in whose favour a Will is made in respect of his right of residence in the house, he shall not have the right of letting out the house on rent. Similarly the person in whose favour a Will is made regarding the income from the house, he shall not have the right of personally residing in that house.^{35a} That is to say, the legatee in whose favour the Will is made regarding his right of residence in a house, he must take residence in that house. And the one in whose favour the Will is made regarding the income from the house, his interest is limited to taking its income only. No legatee shall have the right of violating the legator's specific directives. If the legatee, having right of residence in a house, seeks to realise the income of the house by letting it out and the legatee having right to income only from a house seeks to have its benefit through taking his residence in the house, they shall not have the right to do so. This is the rule of conduct among the Hanafis. According to Imam Shafi'i the legatee who has been given the right of residence is entitled to allow others to take such benefit whether he does or not accept any consideration for the same. In the opinion of this writer, the Shafi'i practice seems to be more expedient and in public interest.

In a case where the Will is made in favour of a legatee regarding the income from a house and the legatee instead of desires to take up his residence in that house, then, according to this writer, such residence in pursuance of his desire should be held as valid, because in essence and intention both are at par. If the legatee desires to live in the house himself, there appears to be no frustration of the legator's intention.

When a Will is made in favour of a person regarding the income from a land, only that income shall constitute the legacy which accrues at the time of death of the legator and which shall continue to accrue thereafter whether

³⁵Ibid, p. 308.

^{35a}Ibid, p. 311.

the Will is not made dependent on time or is specifically of a permanent nature.³⁶

If the legator makes a Will regarding the fruit of his garden or crop of his land, the fruit that are found at the time of death of the legator shall be the property of the legatee and the legatee shall have no concern with the fruit that follow. If the legator specifies about the Will being permanent all fruit crop including the future ones shall constitute the legacy and the legatee shall be their owner. Same shall be the rule even where there is no crop standing at the time of legator's death.³⁷ When the legacy is of usufructs or profits it shall be necessary that the corpus of which it is the usufruct or profit should not in quantum be more than one-third of the estate. The legatee shall be entitled to realise the usufruct of the property to the quantum of one-third of the estate because the legator is not entitled to make a Will regarding more than one-third of his estate; and till the realisation of its usufructs or profits the property shall not be heritable by the heirs. This is so because the legator by making a Will regarding the usufructs defers to that extent the rights of ownership of the heirs. If the property, regarding the profits whereof a Will has been made, is in quantum of one-third of the estate the legatee shall be entitled to get benefit from the entire quantum.³⁸

But of the garden fruit crop that existing at the time of death of the legator only shall be included in the Will. If the legator specifies the Will to be permanent crop, the present or future shall be held to be the legacy. But according to the rule of *istihsān* even if there is no specific mention of the Will being permanent the fruit-crop at the time of death of the legator or growing thereafter both shall be included in the Will.³⁹

If a person makes a Will regarding his garden in favour of someone saying that after his death the garden shall belong to that someone though at the time of making the Will he possessed no garden but he purchased one thereafter before his death the Will shall be valid. If he makes a Will saying that the income from his garden be given to someone and at the time of

³⁶Qadri Pasha; op. cit., Section 556; Zayd al-Abyanī: op. cit., vol. ii, p. 313.

³⁷Qadri Pasha: Section 557; Ibid.

³⁸Al-Kasani: op. cit., vol. vii, p. 353.

³⁹Ibid, pp. 354-55.

making the Will he possessed no garden but he does purchase one thereafter before his death, then, according to Imam Karkhi, the Will shall be valid, though *Al-Mabsūṭ* holds otherwise but, as against this, the view of Imam Karkhi is preferable. This is so because the intention is to make someone, through Will, an owner of property after the legator's death. So the property that exists at the time of death of the legator shall be the criterion and not its absence at the time of making of the Will.⁴⁰

Maliki Law :

Māliki jurists as well agree with other Imams on the point of the validity of Will made regarding usufructs and profits.⁴¹

Shafi'i Law :

Shafi'i as well agree with Hanafis on the point of 'Will made regarding profits and usufructs'. Accordingly a Will made regarding fruit crop of trees etc. is valid.⁴²

Hanbali Law :

According to Hanbali school of law as well, a Will made regarding usufructs is valid.⁴³

Shi'ah Law :

According to Shi'ah Imamiyyah too, a Will made regarding usufructs is valid.⁴⁴ As the Will regarding profits, usufructs, residence in a house, fruit-crop etc. is valid so is the Will regarding the fruit-bearing tree valid, whether the Will is made permanently or for a fixed period. The value of the usufructs etc. shall be determined and if it amounts to one-third the Will it shall take effect for the full quantum and if it exceeds the quantum it shall take effect merely to the extent of one-third.⁴⁵

Zahiri's Rule :

According to Zahiri's, a Will made regarding usufructs profits, benefits and uses such as residence in a house is not valid because the corpus of the

⁴⁰Ibid, p. 355.

⁴¹Al-Saḥnūn: op. cit., vol. xv, p. 66; Al-Ābi: op. cit., vol. ii, p. 317.

⁴²Al-Firozabadi: op. cit., vol. i, p. 449.

⁴³Sharafuddin Al-Maqdisi: op. cit., vol. iii, p. 64; Abul Barkāt: op. cit., vol. i, p. 486.

⁴⁴Al-Hilli: op. cit., p. 258.

⁴⁵Ibid, p. 261.

legator's property, according to them, gets transferred to the ownership of the heirs and a Will regarding usufructs of the property in favour of others shall not be valid.⁴⁶

Modern Legislation :

Egyptian Law :

The provisions of law regarding Will respecting usufructs, user and profits under Egyptian Law of Wills, 1946 are as under :

Section 50. If a Will is made for a fixed period stating therein the time of the beginning of interest the legatee shall be entitled to its benefits for that period. If the said period comes to an end before the death of the legator it shall be deemed that there has been no Will at all. If a part of the said period elapses, the legatee shall be entitled to get the benefit out of it for the rest of the period. If the starting point of the period of benefit is not known and only its terminating point is known, the starting point of receiving the benefit shall be the time of death of the legator.

Section 51. If one of the heirs of the legator prevents the legatee from getting the benefits during the entire or a part of the period fixed in the Will, he shall be responsible to the legatee for compensating him if the other heirs are agreeable to the legatee getting in future the benefit for the period fixed.

If the Will is resisted on behalf of all the heirs the legatee shall have the right to take benefit for the same period in any alternate period from the same specified property or accept compensation from the heirs for that benefit.

If the legatee is prevented from obtaining the benefit for some reason of his own, then another period, after the impediment is removed, shall be fixed for the legatee.

Section 52. If a Will is made for usufructs etc. in favour of a group of persons which is not expected to become extinct the Will is made for something of charitable, the same being permanent or absolute, the legatees shall be entitled to continue getting the usufructs etc. till the group is extinct. When the permanent or absolute Will is in favour of such an unlimited group the extinction of which is not possible the legatees shall go on getting the benefits till their group is in fact exhausted.

⁴⁶Ibn Hazm: op. cit., vol. vi, pp. 393-99.

When a Will is made for a period, the beginning and the end of which are known or without the fixation of its beginning and end it is factually determinable, regard shall be had in such events, of the provisions of previous two sections.

Section 53. When a Will regarding usufructs etc. for a limited period in favour of a limited group is made and thereafter it is made in favour of such persons whose exhaustion is not expected or is made for charitable purposes and no one of that unlimited group is found till thirty three years from the death of the legator, a member of the group is found during that period but the group becomes extinct before the said thirty three years, then, during the whole or part of that period, as the case may be, the usufructs etc. shall be considered to be assigned to the welfare of the general public good.

Section 54. The property regarding the usufructs of which a Will is made, such benefits can be had from the property itself or from the usufructs thereof as well, in such a case the legatee is entitled to the said profit, benefit etc. although it may appear to be against the wording of the Will. It shall, however, be essential that the corpus or utility of property itself should in no manner be affected adversely.

Section 55. When a Will regarding income or regarding fruit-crop is made the legatee is entitled to the income or fruit-crop that exists at the time of death of the legator and that may thereafter be had in future, provided that there appears no intention to the contrary.

Section 56. When a Will in favour of a legatee for selling a particular property on a particular price or for giving the property on a particular amount of rent for a particular period is made and the price (in the first case) or the settled amount of rent (in the second case) is much lower than the proper price or rent, the assessment of one-third quantum with slight variation shall be maintained in its implementation.

If the quantum comes to a paltry amount or the quantum does not admit of a third being ascertained, the heirs can agree to raise the quantum of legacy and implement it, otherwise it shall not take effect, except when the legatee gives up his share (in favour of the heirs).

Section 57. The income of the produce and of the fruit-crops shall be enjoyable by the legatee and the heirs of the legator and each of these parties shall be entitled to the enjoyment, in accordance with reference to time and

space, of their own appointed share or the parts of the share in the corpus of property, if divisible.

Section 58. If a Will for usufructs etc. of a property is made in favour of a particular person and regarding the corpus of the property is willed in favour of another person, all expenditures in respect of its upkeep, fitness and realisation of its profits shall be incurred by the legatee in whose favour the Will regarding usufructs has been made.

Section 59. A Will regarding profits, usufructs etc. shall become void, in the following cases :

(1) When the legatee dies before the realisation of the usufructs etc. either in part or full.

(2) When the legatee purchases the property for the profits whereof the Will has been made.

(3) When the legatee with or without consideration relinquishes his right in favour of the heirs of the legator.

(4) When someone establishes his right or someone's right is established over the legacy.

Section 60. The heirs of the legator have the right of selling their shares in the legacy without the permission of the legatees in the usufructs of the property.

Section 61. When a Will regarding usufructs etc. in a specified property is permanent or is for the life of the legatee, or is absolute, the legatee shall be able to realise the usufructs etc. till his lifetime, provided the right of realising the usufructs etc. accrues to him within thirty three years after the death of the legator.

Section 62. When a permanent or an absolute Will regarding the whole or a part of the usufructs etc. of a property is made in favour of the legatee for his life or for which a period of more than ten years is fixed, the value of legacy shall be determined to calculate one-third quantum of the estate.

If the period of ten years is not fixed then during the period of the Will, the value of the profits from the legacy shall be duly assessed.

Section 63. A Will is made regarding any right, at first the value of that right with its usufructs etc. (for assessing one-third of the legacy) shall

have to be determined. Thereafter the value of that right without its usufructs shall have to be assessed.

Syrian Law :

The following are the provisions of law relating to Will for usufructs in the *Qanun al Wasiyyat*, Syria of 1953.

Section 246. (1) If the period in a Will of usufructs etc. is so described that the beginning and the end whereof is to be fixed, the legatee shall be entitled to the usufructs for the period so determined. If the period terminates during the lifetime of the legatee, the Will shall then become void. If a part of the period passes away, the right to the usufructs shall subsist (for his heirs) for the rest of the period.

(2) When the period is a fixed one and its beginning is not specified, the beginning shall be from the time of death of the legator. It shall, however, be subject to the provisions of section 247.

Section 247. (1) If any one of the heirs prevents the legatee from getting the usufructs of a property under Will made in his favour, the said heir shall have to pay him the damages for the said usufructs.

(2) When an impediment is created on behalf of the heirs in legatee's getting the usufructs the legatee shall have the option of either agreeing to take his usufructs etc. at some other time or accept due compensation for the same.

When there is an impediment to the getting of usufruct etc. (having been created on behalf of the legator) or due to other compelling reasons, a fresh period of availing of his right by the legatee shall start after the removal of the impediment.

Section 248. If the property regarding which a Will for its usufructs or user has been made is capable of being the means of use and income both, the legatee shall have the right of getting either of the two. It will be open to him to get its use, usufructs by letting it on rent or to take its income. The condition shall, however, be that the corpus of the property itself is not damaged.

Section 249. When Will is made regarding fruit-crop of a tree the legatee shall have his right in all that crop which exist at the time of death of the legator and if, there is no indication to the contrary, to those that shall grow thereafter.

Section 250. When a Will is made regarding a part of usufructs etc. it shall be obtained from the share of the legacy after its division in proportionate shares of either its income or its fruit-crop between the legatee and heirs of the legator; or some other method in accordance with the requirement of period or portion of the usufructs etc. shall be adopted for the realisation of profits. If the property itself is divisible and there is no risk of damage in its division, the right to usufructs etc. shall be through its division. In case of dispute the authorised department shall have the right of permitting the adoption of one of the afore-mentioned methods.

Section 251. (1) In a case where the Will regarding usufructs etc. is in favour of one and the Will regarding corpus of the property is in favour of another, both the Wills shall be valid. The responsibility for payment of the taxes of the property and the cost of maintenance shall rest with the legatee in whose favour the Will regarding usufructs etc. is made.

(2) The heirs shall have the right of selling the corpus of the property, regarding the usufructs of which a Will has been made, without obtaining permission from such a legatee, for usufructs.

Section 252. The Will regarding usufructs etc. shall be considered to have lapsed in the following circumstances :—

- (a) When the legatee dies before making use of the usufructs etc. either full or in part.
- (b) When the legatee regarding usufructs etc. himself becomes owner of the corpus of the property.
- (c) When the legatee renounces his right with or without consideration in favour of the heirs of the legator.
- (d) When a claim of someone else is established on the property.

Section 253. In case of Will regarding usufructs etc. the method of calculating one-third of the estate of the deceased shall be as under :—

- (a) When the Will regarding usufruct etc. is permanent or is absolute or is for the lifetime of the legatee or is for a fixed period of more than ten years, in case of Will regarding the entire profits (usufructs) etc. of the property, the profits (usufructs) etc. shall be considered to be equal to the value of the actual property; and in case of Will regarding a part of the usufructs etc. the proportion of that part to the value of whole property shall be the criterion.
- (b) When the period for realisation of usufructs etc. is of less than ten years, calculation shall be based on the value of the usufructs of the property during that period.

- (c) When the Will is made in respect of some right in property its division of the property shall be made after finding out the difference between the value of the actual property plus the right bequeathed therein and of the actual property minus the right bequeathed therein.

Tunisian Law :

Following are relevant provisions of law in the *Qanūn al-Wasiyyat* of Tunis, 1957.

Section 182. A Will regarding usufructs etc. shall be enforceable merely in favour of the first generation and on their extinction the heirs of the legator shall become entitled to that usufruct.

Section 189. A Will regarding usufructs etc. of a property shall remain in force for the period fixed for it. In case of non-fixation of a period, the legatee shall himself have the right to the profits till his lifetime, unless there is anything to the contrary in the Will.

Section 250. A Will settling stipends from the income of the legacy is valid.

Will regarding
stipends

COMMENTARY

Sometimes the Will is made regarding the actual corpus of the property, for instance, such and such garden be given to such and such person. Sometimes it is made concerning the profits, usufructs etc. of a property, for instance, the produce of such and such garden shall belong to such and such person. But sometimes a Will is made for settling stipends from the income viz. whatever is the income from such and such garden, a certain amount from the same be continued to be paid as stipend to the legatee. In such cases also, sometimes the income from a particular property is mentioned and at others the property is not specified at all, the income being mentioned independent of it. Such a Will is technically called "*Wasiyat Murattabah*".

Modern Legislation :

Egyptian Law :

Section 64. A Will regarding the giving of an amount in cash from the (income of) real property (legacy) for a fixed period is valid. A part of the income from the property of the legator shall be kept in reserve from which the fixed stipend shall be paid provided the heirs do not suffer any loss.

In case the amount reserved for carrying out the Will exceeds one-third of the entire income and the heirs are not in favour of reserving the amount

in excess it shall be reserved to the extent of one-third only. The Will shall be implemented from this one-third and from the one-third of future income respectively till the legatee is alive or till the period stipulated in the Will expires.

Section 65. When the stipend is fixed from the income of the legacy or from some specified property out of the estate and if during the period fixed for stipend, the legacy sometimes does and sometimes does not suffice the stipend and in both the cases the proportion of the value of the legacy is found to be in accord with the amount of the stipend and is to the extent of one-third of the total income, the Will shall be put into effect to the full extent. But if the stipend is to the extent of more than one-third of the total income and the heirs do not give their consent to the excess, the Will shall take effect to the extent of one-third of the total income only, and the heirs shall be entitled to the rest of the income, to other income from the legacy and to the corpus of legacy itself.

Section 66. When a Will is made in favour of a particular legatee, in the absolute or restricted or for lifetime of the legatee, out of the property itself or out of its income from which the stipend is settled, a medical practitioner shall be consulted about the expected life-span of the legatee. According to such an estimate the amount of income shall be reserved for the legacy in the method stated under Section 64, whether from the property itself or from its income, as the case may be, for the payment of the settled stipend. In case of Will regarding income it shall be acted upon according to the provisions of Section 65.

If the legatee dies during the period fixed by the medical practitioner the remaining property under the Will shall belong to the heirs of the legator or to the person in whose favour the Will is to operate after the first legatee. If the reserved portion from the Will exhausts itself or the legatee lives longer than the period estimated by the medical practitioner, the legatee shall have no right of recovering the same from the heirs.

Section 67. If the reserved portion of the income from the legacy is insufficient to meet the fixed amount of stipend, the stipend shall be made payable by making up the fixed amount from the sale of some of the corpus of property. If the sale price of that property exceeds the amount (of the stipend), the heirs shall be held to be entitled to that excess amount.

If the reserved portion of the income is in excess of the amount of stipend it shall be kept in reserve till the period of award of stipend. When the income from the legacy during any year, is not enough to meet the amount of stipend, the fixed amount of stipend shall be made up from the

reserved income. So shall it be in case the Will is regarding the income from some specified property of the legator.

When it is declared in the Will that the fixed amount of stipend shall be paid yearly or there is some arrangement to that effect, the heirs of the legator shall be entitled to the excess amount of the yearly income.

Section 68. When a stipend in a Will is fixed for such a cause, which is recurring or absolute, shall be reserved such a quantum from the property of the legator that shall suffice the fixed stipend. This quantum, however, shall not be more than one-third of the property except when the heirs give their consent.

If the income of the specified part of the property exceeds that amount which is fixed for that cause, the excess shall be spent over the same cause. If the income of the specified property is less than the fixed amount, it shall not be made up from the other property going to the shares of heirs.

Section 69. The heirs of the legator, keeping in view the provisions stated in Sections 64 to 67, shall, for putting the Will into effect, have the right that they keep the reserved part or the fixed quantum of it in their possession or appropriate it to their own use; this appropriation is for such a cause to which the legatee expresses his consent or the State fixes all the cash amounts of stipends or the total cash amount for putting the Will into effect. However, whatever remains after being spent from the said amount at the death of the legatee the same shall be made over to the heirs of the legatee.⁴⁷

Section 251. Will regarding a property which is not in existence at the time of making the Will but comes into existence at the time of death of the legator shall be valid.

Will regarding
non-existing
property

COMMENTARY

There is, on the whole, consensus of opinion among the four Imams and Shi'ah Jafariyyah on the question that a Will regarding a property, which is non-existing at the time of making the Will, but comes into existence at the time of death of the legator, shall be valid.

Hanafi Law :

The Hanafis have classified Wills regarding properties that are not in existence in the following manner :

⁴⁷Qanun al-Wasiyyat, Egypt, 1946, Chap. IV.

(1) The properties that exist at the time of making the Will but do not exist at the time of death of the legator.

(2) The properties that do not exist at the time of making the Will but come into existence, after the Will is made, at the time of death.

The properties that are in existence at the time of making the Will but become non-existent at the death of the legator, a Will made regarding them shall be operative when they, after death of the legator, come into existence again. In case of their continuing non-existence the Will shall become void.

Will, regarding that does not exist at the time of making the Will but comes into existence after the Will is made, such as the young one of an animal, shall, on the basis of *istihsān*, be valid. When it comes into existence it shall be considered to be the property under the Will. But fruit-crops on garden trees that may grow or come into existence after the death of the legator shall be included in the Will when the legator has specified about the Will being a permanent one. This is what the *Qiyas* demands but on the basis of *istihsān* even if no specification of it being of permanent nature has been made, the aforementioned rule shall apply, which has been constantly acted upon. Likewise, if a person makes a Will regarding his garden in favour of another person, saying that his garden after his death be given to such person, and there is no garden belonging to him at the time of his making the Will but a garden is purchased by him thereafter and then the legator dies, the Will regarding the garden shall be valid. If in the aforementioned case Will is made regarding the income of the garden, according to Imam Sarakhsi, it shall not be valid. According to Imam Karkhi, however, it shall be valid because according to the law of Wills that property in the legacy should exist after the death of the legator. In the aforementioned case the garden exists and so the income therefrom may be available. This is the correct view of the matter.⁴⁸

The three Imams :

Imams Shafi'i, Malik and Ahmad b. Hanbal are in agreement with the Hanafis on the question of Will regarding property which is non-existent but there is a possibility of its coming into existence or the income arising out of it,⁴⁹ The possibility of the existence of legacy is a condition for the validity of a Will. But Will regarding the property which, though non-existent, has the possibility of coming into existence and capability of being delivered,

⁴⁸Al-Kasani: op. cit., vol. vii, pp. 354-55.

⁴⁹Al-Firozabadi: op. cit., vol. i, p. 459; Al-Sahnūn: op. cit., vol. xv, p. 66; Sharafuddin Al-Maqdisi: op. cit., vol. iii, pp. 64-67.

shall be valid, for instance, birds flying in the air, or a child in the womb, or milk in animal's udder or such non-existing articles the coming into existence of which is expected, trees when bearing fruit whether permanently or for an appointed period. When the said objects shall come in existence they shall belong to the legatees otherwise the Will shall become void.⁵⁰

A Will shall take effect with respect to all properties (existent or non-existent etc.) that shall come into the legator's ownership afterwards; for instance a person makes a Will regarding one-third of his property, thereafter his property improves further or he sets a net and game therein are netted (after his death) such all shall be included in the property under Will.⁵¹

Shi'ah Law :

The Shi'ah Imamiyah, on this question agree with Sunni schools of law.⁵²

Zahiriyyah :

The Zahiriyyah do not consider a Will regarding profit, usufruct etc. to be valid. Hence a Will for maintenance, or for residence in a house, according to them, is void. From this it may as well be concluded that what is non-existent at the time of Will, and what may come into existence after the death of the legator, Will regarding the same shall not, according to them, be valid. Similarly a Will, according to them, regarding whatever shall grow in the garden or whatever rent of the house shall be received or regarding matters similar to these shall not be valid.⁵³

Section 252. A Will made by a legator regarding his dead will for eyes body for anatomical purposes or in respect of the eyes of his dead body in favour of a charitable institution or a particular person as beneficiary, for separating them from his body after death, and making their use for grafting the same in the body of another deserving person being in dire

⁵⁰Sharafuddin Al-Maqdisi: op. cit., vol. iii, p. 64; Abul Barkāt: op. cit., vol. i, p. 386.

⁵¹Sharafuddin Al-Maqdisi: op. cit., vol. iii, pp. 67-70.

⁵²Al-Hilli: op. cit., p. 261.

⁵³Ibn Hazm: op. cit., vol. vi, p. 393.

need and having no alternative treatment, shall be valid and enforceable in *Shari'ah*, subject to the following conditions:—

- (i) The donation (by Will) is motivated purely for human good and be without any remuneration, consideration or compensation whatsoever.
- (ii) The legatee's (donee's) need be genuine and in the nature of extreme and dire necessity, having no alternative treatment, duly certified by two Muslim medical practitioners of integrity.
- (iii) The legator (donor) leaves behind no heir. In case there is an heir, obtaining his consent, after death, shall be necessary. If any one of the heirs, there being more than one heir, does not consent to it, the Will shall not be executed.
- (iv) In case the Will is in respect of eyes of the dead body the said eyes be taken out or separated from the body, after certification of death by two Muslim medical practitioners of integrity, to the extent of the need as per Will, only before burial of the dead body and no insult or unnecessary disfiguration is done to the dead body.

COMMENTARY

History bears witness that every new age brings with it new problems. The present scientific and industrial age as well is confronted with unique problems. For example, the astonishing break through the science of medicine and surgery has led to the unique methods of preservation and protection of human body and life. Alongside these inventions and innovations it has also become necessary to lay down certain rules regarding their validity under the Islamic *Shari'ah*. The science of surgery has become so advanced these days that it has reached the stage where ailing, external or internal, organ of the human body, if so required, can be replaced by the same kind of organ taken out of a fresh dead body of another person to give a new lease of life to the living body or organ, as the case may be. In these circumstances, it is becoming a general practice on purely humanitarian grounds to make a Will regarding some organ of the donor such as eyes, heart etc., in favour of some concerned institution or hospital to the effect

that after his death it be put to use for a person who is in need of it, so that it may become the means of the donee's recovery and restoration of his health or life. In consequence thereto, after proper certification of the donor's death the organ regarding which the Will has been made is separated from the dead body and grafted on the donee, the beneficiary. The question here arises whether this action of the legator is valid or invalid under the Shari'ah and is the Will enforceable or not? The point at issue though basically relates to 'Gift of human limb through Will' but, later on as time passes, it may also include the cases of contingent transfer of property by other modes such as sale, possession whereof may be agreed to be made over on the happening of the donor's death. In the present age when the humanity is in the full grip of materialism and the practice of grafting human limbs is becoming common, the possibility of sale and purchase of human limbs cannot be ruled out. In fact, the sale of dead bodies is not unheard of. The cases of sale and donation of blood are fairly common these days. Started with the sincere motive of preserving human lives, blood banks are now part of hospital establishments. People, in the beginning, donated their blood voluntarily. But it is generally observed that unemployed youths, for quenching the fire of their hunger, sell their blood repeatedly to get two morsels of food. The practice now has turned into a systematic trade. So, while considering the question of Wills regarding limbs of human beings (and their grafting) the possibility of the start of their sale and purchase, which is unlawful, must not be overlooked. Now we turn to the real problem.

Three Questions :

In discussing the proposition of 'Will regarding human organs' several questions arise :

- (i) What position a human being holds compared to all other creatures in the universe ?
- (ii) Whether human being is a master of his body and soul in the same manner as he is the master of other creations in the universe.
- (iii) Whether Islamic Shari'at holds the human body as a valuable property (*māl Mutaqawwam*) like other properties or articles, and whether a man may utilise his body in the same manner as he does utilise his other possessions ?

For answering these questions, we shall at first turn to the 'Book of God' so that we may find out as to what position the Creator of human beings Himself has assigned to man and woman in the scale of existence.

But before discussing Qur'anic provisions, I would like to place one fundamental argument which is acceptable to all.

Prohibition of Suicide :

In all faiths and religions it is settled absolutely that suicide is unlawful. That is to say a man has, on no account, the right of putting an end to his own life. Islam strongly condemns suicide. It is narrated from Abu Hurayrah that the Prophet has said, "The person who puts an end to his life by throwing himself down from the height of a hill, he shall for ever be giving up his life by throwing himself down from the height of a mountain into the fire of Hell. The person who gives up his life by taking poison, he shall for ever be taking poison in the Hell fire from the poisonous goblet in his hands; and the one who puts an end to his life by the use of an iron weapon, he shall be for ever giving up his life in Hell-fire by such a weapon."⁵⁴

In another narrative, it is stated that the Prophet said "A person had become wounded, (not bearing the wounds), he killed himself. God said, "The man in defiance of Me made haste in giving up his life, hence I made paradise unlawful for him."⁵⁵

Thus it being invalid for a human being, in his lifetime, to utilise his body and soul in a manner not conformable to *Shari'ah*, shall it by the Will be invalid to permit others to utilise parts of his body after his death? This point should be well kept in mind before we proceed further.

Qur'anic Guidance :

There is no verse in the Holy Qur'ān which deals with the making of "Will" regarding the human organs (or their grafting to the body of any other human being). But a study of the verses found here and there in the Qur'an regarding the honour and dignity of human beings brings out the unique eminence of human beings as compared to other creatures. Allah in the Holy Qurān says,

- (1) "And behold, thy Lord said to the angels "I Will create a vicegerent on earth" (II : 30) In this verse, the reference to "vicegerency on earth" is the soundest proof of human greatness.
- (2) In another verse it is said, "O'David ! We did indeed make thee a vicegerent on earth" (XXXVIII : 26) God has not limited this

⁵⁴'Ala' uddin b. Ali al-Khazan (d. 725 A.D.): *Tafsīr al-Khāzan*, Cairo, vol. i, p. 513.

⁵⁵Ibid.

exalted position to merely Adam; rather the entire progeny of Adam is included as has rightly been stated by Qāḍi Bayḍāwī in his Commentary of the Holy Qur'ān.

- (3) "We have honoured the sons of Adam" (XVII : 70).
- (4) "We have indeed created man in the best of mould" (XCV : 4)
- (5) "And has given you shape and made your shapes beautiful" (LXIV : 3) Man is the best figure drawn by God. Even the angles were made to pay respect to him. Continuance of respect to human being till Eternity is the real purpose.
- (6) "It is He, who hath created for you all things that are on earth" (II : 29), that is to say, all creatures of earth have been created for the benefit of human beings.
- (7) "Seest, thou not that Allah has made subject to you (men) all that is on earth" (XXII : 65). That is to say, God has made all other creatures subordinate to men.
- (8) The same thing at another place has been stated thus, "And he has subjected to you as from Him, all that is in the heavens and on earth." (XLV : 13). Ultimately, God by making the man respected by angels certified the greatness and grandeur of man over all the creatures of the universe.

From a study of the above stated verses it becomes abundantly clear that man is the highest creation and God has made the whole universe subservient and subjected to man's control. Hence, a man is entitled to acquiring and exercising ownership over the corpus and the usufructs of all the creations in the universe but he is not capable of acquisition of the person itself of another man, excepting, in certain events, the acquisition and exercise of some kind of control of ownership and benefit out of him allowed by the Shari'ah. It is thus clear that man himself is not an absolute master of one's body including his own body, soul and organs that he may *freely* and of his own choice deal with them, as is, generally speaking, the case with other things and commodities. God alone is the real Master of the body and soul of mankind. That is why, the Muslim jurists hold a human being as created to be invaluable (*māl ghayr mutaḳawwam*): Imam Sarakhsi (d. 484, A.H.), therefore, says in his noted work, *Almabsūt* that a free man cannot be sold and purchased. The basis of a 'thing' being included in a contract of sale is that it should be an object of some value. This ingredient is not found in a free man (Vol. XIII, p. 2). Imam Muhammad Al-Shaybani has in his noted work, *Al-Siyar Al-Kabīr* said, "We infer from this rule that

when a Muslim is imprisoned (at the hands of non-Muslims) he remains a free man and the one purchasing him from the enemy can not be his master (Vol. i, p. 305) Hence, a person who has no right of dealing in his life time freely with his body and soul, has similarly no right of conveying any right to others of dealing with his body or a part of his body, after his death.

There, however, remains the viewpoint of showing generosity towards humanity by such donation of one's organs. The answer is that man's reverence in the words of God is absolute. One's good intention cannot change the unlawful into lawful. For instance, the sale and purchase of wine according to *Shri'ah*, is unlawful. If one deals in wine with the purpose of spending its profits on Muslim beggars the dealing shall not become lawful by this purpose or intention; nor under the same intention the dealing in interest-bearing transactions or the accepting of bribe shall turn them from being unlawful acts to lawful.

Prophet's Traditions :

Several traditions regarding the dignity of human beings reported from the Prophet (*Ṣallallaho 'alayhi wa Sallam*) may also assist us in drawing conclusions respecting this question.

It is narrated by 'Abdullah b. Yazid that the Prophet has forbidden the cutting and clipping of a human body e.g. cutting of nose and ears.⁵⁶ Significance of this tradition is that as 'respect for man' is required in his lifetime so should it be maintained after his death. Hence it is not valid to cut off any part of his body after his death which evidently shall disfigure his body.

Ibn Abi Shaybah reports from Haḍrat 'Abdullah b. Mas'ud as stated that torturing a *Momin* after his death tantamounts to torturing him in his lifetime.⁵⁷ Reports mentioned in the books of traditions regarding respect to graves are in themselves the clear proof of such veneration to human body. The prophet has sternly forbidden the chopping off the hands, feet, nose, ears etc. of the dead human body. This bidding covers the whole human race without distinction of religion, caste or creed (*Sharh Al-Siyar al-Kabīr*, Cairo, Vol. i, p. 305). The Prophet laying stress on showing respect to the dead bodies has said, "Accord the same treatment to dead bodies as

⁵⁶ *Mishkat al-Maṣōbīḥ* : Karachi, p. 255 :

”ان النبي صلى الله عليه وسلم نهى عن النهبة والمثلة“

⁵⁷ *Ibid* :

”اذى المومن في موته كاذاه في حياته“

you do to your brides".⁵⁸ In another tradition it has been said that breaking the bones of dead body is like the breaking of bones of a living man.⁵⁹

Jurists' Opinions :

The jurists as well have expressed their views on this question in full consideration of the situation prevailing in their own times. Although the views expressed by them are not specific about the Will in respect of the organs of a dead body but the several examples reflect upon the question of grafting of limbs. Conclusions from them may also be drawn regarding the question of making a Will in respect of human body or any part thereof.

Hanafi View :

Burhan al-Din Al-Marghinani, the author of *al-Hidayah*, has said that the prohibition of using the organs of a dead human body is on account of veneration for human beings.⁶⁰ It is also written in the *Hidayah* that the sale of human hair is not valid, nor its use. This is so because man is a venerable being and is not to be humiliated.⁶¹

Akmal Mahmud Al-Babarti, the commentator of *al-Hidayah* and the author of *al-Inayah*, explaining the view of the author of the *Hidayah* on this question, has said that the prohibition is because God has made man respectable, the people may not become emboldened in disgracing any part of the dead body of human beings.⁶²

Ibn 'Ābidin, the noted Hanafi jurist has written in *Radd al-Muhtār* that the selling of human hair or putting it into use is not valid, because man (as man) is respectable though he may be an infidel. To include man among the other animals in the manner that his organs may be put to use amounts to putting him at a lower level and this is not valid. A part of man comes under the order of the whole of man (Vol. IV, p. 45).

⁵⁸Ibn Qudāmah : *Al-Mughni* : Cairo, vol. ii, p. 541 :

“اصنعوا بموتكم كما تصنعون بغير التمسككم”

⁵⁹Ibid :

“كسر عظم الميت ككسر عظم الحي”

⁶⁰Al-Marghinani : *Al-Hidayah* : Karachi, vol. i, p. 41 :

“حرمة الانتفاع باجزاء الادمى لكرامته.. ولتا ان عدم الانتفاع والبيع لكرامته”

⁶¹Ibid, vol. iii, p. 55.

⁶²Akmaluddin Muhammad b. Mahmūd al-Babarti : *Al-Inayah*, o.m.o., *Fath al-Qadir*, Cairo, vol. i, p. 165 :

“..... لئلا يتجاسر الناس على من كرمه الله بائذال اجزائه”

It is laid down in *Fatwa Alamgiri* that the jurists have held valid the use of animal's bones except that of hog for the treatment of human beings. But the use of bones of human beings has been held to be totally forbidden (Vol. iv, p. iii).

It is written in *Sharh Al-Kabir* that "treatment of a disease by means of rotten bones of animals is valid because according to us (the Hanafis) the bones of animals on their death do not become impure in as much as no life ever existed in them. But treatment from the bones of human beings or of hogs is forbidden. The reason for the treatment from the bones of hog being forbidden is that its bones too are altogether impure as is its flesh altogether forbidden. In no circumstance its use is valid. The reason for the prohibition of treatment from the human bones is that man even after his death is as respectable as he was in his life. Hence as treatment with any portion (or organ) of a living human being, because of its respectability, is not valid, so shall not be valid the treatment from the bones of a dead body." (Vol. i, p. 103).

There is consensus of opinion on the point that if a person's tooth is removed from its place it is forbidden to replace it by a tooth taken from the jaws of a dead body. Likewise, according to Imam Abu Hanifah and Imam Muhammad Al-Shaybani resetting a fallen tooth as well in its place is also forbidden. But the tooth of a goat that has been slaughtered may be set in its place. Indeed, according to Imam Abu Yousuf there is no objection in one's own tooth being re-set in its place.⁶³ According to Imam Abu Yusuf, however, setting the tooth of a dead body to that of an other person is forbidden. According to the principle of Hanafi fiqh the argument of Abu Hanifah and Al-Shaybāni is that as, after death, the burrial of the entire human body is obligatory so it is befitting for each part of the body to be buried after separation and not to be put to any other use. Hence, putting the separated tooth to any use is not valid. The concurrent opinions of Imam Abu Hanifah and Imam Muhammad Al-Shaybani are held as preferred.

Shafi'i View :

Imam Shafi'i has also discussed this question in his noted book "*Al-Umm*." He writes, "If a woman's bone (same is true of a man's bone) after fracture gets separated, it is not valid that the same bone be grafted back on her. It shall indeed be valid that grafting be made with the bone of some animal which has been slaughtered and the meat of which is not

⁶³Al-Kasānī: op. cit., vol. v, p. 132; *Fatawa 'Alamgiri*, Calcutta, vol. v, p. 372; Ibn Nujaym : *Al-Bahr al-Ra'iq*, Cairo, vol. viii, pp. 113-133.

prohibited. Likewise, the tooth of a person after it is dislodged and separated becomes dead. It is not, therefore, valid to re-set it as its own place." (Vol. i, p. 54).

So, the view of Imam Abu Hanifah, Imam Muhammad and Imam Shafi'i is that if the tooth of a person gets separated it can not be re-set at its own place. According to Imam Abu Yousuf's opinion, however, one's own tooth (probably, hand or any other limb) may validly be grafted back. But even, according to him, there is no ground for the grafting of any organ (or limb) of a dead body of another person to that of a living person.

Imam Abu Yousuf, advancing the reason of difference between the law relating to the person's own part of the body and that of another, says, "Man's own tooth (the separated one) is a part of his own body which is presently separated from it. If it is set in its own place it is possible that it may get re-set there (heal up) and return to its original position". The second reason is that one's using the separated part of the body of another person shall be the cause of belittling that other body because man with all parts of his body is a respectable object, superior to other creatures. The re-setting of one's own part of the body in its own place, is not considered as belittling the human body. This view is based on the doctrine of *Istāḥsān*.

Points Recapitulated :

The points that can be made out from the above discussion are as under :—

1. God's highest creation is man and all other creatures of His are held to be subservient to him and are at his service and for his use and exploitation.
2. On this basis, with a view to protect superiority and dignity the purchase and sale, cutting and clipping, of human limbs as well as his committing suicide have been forbidden. These principles are not exclusive to the Islamic *Shari'ah* alone. Christianity, too, is convinced of them. Thus a person cannot by mutual consent make a gift of any of his limbs in favour of another, whether with or without consideration. A living body is not impure intrinsically but after one is dead he becomes a corpse and all his limbs are dead and none of them can be used by any other person. No limb of a dead person, particularly by way of grafting, can be set into the body of a living person because such act of *grafting shall be the mixing of pure and impure which is for-*

Fatawa Alamgiri that utilisation of human limbs has been held to be unlawful because of their impurity. Jurists on this basis also hold that if a human tooth is grinded alongwith flour its use shall be unlawful.

3. A man is entitled only to make use of his limbs and other parts of his body to the extent and in accordance with the dictates of God.

Use of human limbs in the state of extreme necessity :

The discussion shall remain incomplete if the use of human limbs 'in the state of extreme necessity' is not discussed as well. There is, in principle, no difference of opinion that taking of pork, wine or the meat of dead animals is forbidden. But the Holy Qur'ān has even in extreme necessity permitted their use to the extent of real need. The Jurists, likewise, have for the purposes of treatment held the use of blood, urine and dead bodies of animals as lawful on condition when, according to doctors, the life of a patient depends upon the use of those unlawful things and no other permissible medicines can replace their use. It may occur to one's mind that on the basis of this rule, the use of man's limbs in case of extreme necessity, should also be allowed. In this connection the different juristic points of view that may help in arriving at correct conclusion on this question, are stated as under :—

Hanafi View :

It is stated in the *Fatāwā Alamgiri* that "a person in extreme necessity who does not have even the meat of a dead animal to eat and is in the peril of losing his life, even if another person asks him to cut off his (that another person's) hand and eat it or to cut off a piece of flesh from his own body and eat it up, the said person shall not have licence for doing so nor shall the request be valid. As the said person, even under extreme necessity, has no permission for cutting up any part of his body and eat it up, so has he no leave to cut out any part of the body of another person and eat it up (Vol. iv, p. 103), although his doing so may be with the consent of that other person."

There is difference in the reasoning for prohibition of use of human limbs and that of things non-human, Prohibition for things non-human is either because of their being intrinsically impure or is due to impairing the reverence embedded by God in the human soul. As against this, forbiddence of use of the parts of human body is due to the dignified creation of the making. In this respect, no distinction is maintained between the living and the dead body of a Muslim or non-Muslim and the mandate for both is the

same. That is why, a man after his death, because of the dignity and reverence of his creation, (*takhliq*) his dead body or any part thereof, being put to a use, even in extreme necessity, is forbidden. Hence the eating of a dead man's flesh shall not be permissible. The second difference is that blood, wine and pork are things quite different from human body. Thus, according to Hanafis a man is allowed, in the state of extreme necessity, to eat certain, just to save his life from hunger but he can not eat his own limbs or those of another human being, either living or dead, even to save his life from hunger. From this it becomes evident that parts of human body are not at par with other of his possessions. However, some of the Shafi'i and Hanbali jurists and the Shi'ahs as well are convinced of lawfulness of eating of human limbs in the state of extreme necessity, to save oneself from dying of hunger, as discussed below.

Shafi'i View :

There is a ruling quoted in the noted book of Shafi'i *fiqh*, *Al-Muhazzab* (Vol. I, p. 258) that if a person is in the state of extreme necessity and does not get any thing except the human dead body for saving his life, it shall be lawful for him to eat the flesh of that dead body (to the extent of saving him from death). The Shafi'i doctrine of necessity goes so far that it allows one who has repudiated Islam or committed adultery and has been sentenced to death, to be killed so as to quench the hunger of a starving Muslim in his extreme necessity. But still the question remains that if extreme necessity overpowers him and there appears to be no way except the eating of one's own flesh, whether it would be lawful for a man to cut up a portion of his own body and eat it up and thus save his life? On this question there appear to be two views among the Shafi'is. According to Abu Ishaq acting thus is lawful, because through one portion of the body the entire life is saved, in the same way as the cutting away of that portion of the body which is affected by a septic wound is lawful. But some of the Shafi'is have said that this shall not be lawful.

Hanbali View :

According to Hanbali jurists as reported in *Al-Muḥarrar fil fiqh al-Hanbali*, (Vol. ii, p. 190), it is lawful for a person at the verge of death due to extreme hunger to kill and eat the flesh of a man whose putting to death has under the *Shari'ah* become permissible (for instance, a married adulterer by a judicial order).

Shi'ah View :

According to Shi'ah jurists as well it is lawful in the state of extreme necessity of saving life to eat the flesh of a human dead body. The renowned

Shi'ah mujtahid, Al-Hilli has, in his book, "*Shara'i al-Islam*" (Vol. ii, p. 149), written that if a person, at the verge of death due to extreme necessity, finds nothing except a human dead body, it would be lawful for him to eat, according to his needs, the flesh of that dead body. It would not however, be lawful if a man who is alive and innocent is killed and his flesh is eaten by the person standing in extreme hunger, even at the verge of death. Indeed, if the death-sentence of some one has judicially been confirmed, it would, then, be lawful that the man may be killed and the quantity of flesh permissible be cut out from the dead man's body, and eaten up to save one's life from extreme hunger. If to the person facing extreme necessity there is nothing obtainable except his own body, some of the Shi'i ulemā' maintain that it is lawful for him to eat his own flesh after cutting the minimum necessary from the fleshy part of his body. But this view is not reliable.

Analysis :

On the question of eating a part of human body the points of view of some Shafi'i, Hanbali and Shi'a jurists, which have been stated above, are based on the rule, "Necessity turns forbidden into permissible."^{63a}

Indeed, in such a case it is necessary to observe all the conditions of "the law of necessity." The Imams hold the setting of another persons' bone or tooth in place of the broken bone or lost tooth to be forbidden. The reason, perhaps, is that the condition of the person, whose bone is broken or whose tooth is lost, is not that of "extreme necessity" so as to involve the danger of death.

So far as the respect for humanity and the eminence of mankind is concerned, ordinarily they must be kept fully in view. Similarly the observance of the precepts of the Prophet regarding showing respect to dead bodies is also binding. Still, in the present circumstance, the directives of the aforesaid *Imams*, fall under the doctrine of extreme necessity. There is never the intention of showing disrespect to the dead body or putting it to distress. For instance, a man falls into a well, there is the necessity of the water of the well for the inhabitants without which there is the risk of their dying for want of it. Then, there may not be a way of taking out of that man's dead body from that well except by putting it to distress. The permission for doing so may be given, provided there is no alternative left except such distress. This is so because the injury in putting a dead body to distress is lesser than death of all the inhabitants by thirst. Similar will be

^{63a} الضرورات تبيح المحظورات

the case of a person under extreme necessity who, if he does not get cloth to cover his body, can use the shroud of a dead, for covering the body of a living human being is more preferable than showing regard to a dead body. Likewise, if a pregnant woman dies and the child in her womb is alive, the child may be brought out by operating on the womb of the dead pregnant woman, provided the child is alive. Ibn Qudamah al-Maqdisi (Hanbali) has mentioned these cases in his book "*Al-Mughni*" Egypt 1376 Hijra. Vol. II, p. 540-41 and 551.

It appears from the above examples that the exception shall be valid only in case of the state of extreme necessity wherein the risk of immediate and imminent death is involved and it appears certain that human life shall be saved.

Impurity of separated limb :

An objection may also be raised that by grafting a limb the mixing of pure and the impure will necessarily follow. That is why, Imam Shafi'i has given the verdict of taking out the grafted tooth and repeating the prayers (*ṣalāt*) for the relevant period. However, the question is whether the impurity follows immediately after the limb is separated from the body or sometime thereafter, when it (the limb so separated) has no sign of life and becomes unserviceable? Let us suppose, immediately after the limb is separated, it is scientifically preserved and kept serviceable in as much as it can work well on grafting, whether in such an event, the limb shall be called *maytah* and thus impure, or will it be deemed to be alive (as against *mayyit* or *maytah*) and thus pure? Scientifically such a limb is not considered as dead or unserviceable, otherwise its grafting in no case would have been possible. But to answer this question from Shari'ah point of view, we come across a similar case in the books of *fiqh*. It is stated in *Kitab al-Ṣayd*, that a man shoots an animal by his arrow (or now by gun). The animal falls down, but as a result of shooting one of its limbs gets separated from its body. The man immediately rushes to the spot and slaughters the animal. The question arises, whether it will be lawful to eat the separated part even if it is slaughtered separately? The jurists say, the part became *maytah* and it is not lawful to eat it. On this analogy, therefore, the human part once separated from its body will become *maytah*. Conclusion which may, thus, be drawn is that a part of human body which may, scientifically speaking, have life in itself for sometime, becomes *mayyit* and thus *maytah*, impure soon after it is separated

from the body. In *Taj āl-Urus*, too the word *mayyit*, dead has been defined as: “ما انفصل من الحي فهو ميت” anything which is separated from a living one is *mayyit*, dead, (and so *maytah*), and this seems to be correct.

Definition of “*Maytah*” : Probably, the ruling respecting the validity of eating dead man’s flesh in the state of extreme necessity given by some of the Shafi’i, Hanbali and Shi’ah jurists appears to have been based on the permission given by God in the Qur’an to eat from a dead body (*maytah*) in the state of extreme necessity when there is the serious and immediate risk of losing the life and except for that dead body (or other forbidden article) there is nothing else available for saving life. This proves that in some cases mere human dignity may be over-looked for attaining some superior object e.g. saving human life. These jurists appears to have included both body of a dead human being and the body of a dead animal, within the meaning of the word, *maytah* (dead body). This may be literally correct but legally it appears to be confusing. Here the term “*maytah*” should not be applied to the human dead body, because from the context in which the word “*maytah*” occurs in the Qur’an regarding the eating of dead bodies in the state of extreme necessity, it seems that only dead bodies of those animals are referred to, which are included in food and eaten ordinarily. The word, *maytah* in Arab society was not in use for human dead body. The proper word used for a dead human body was “*Mayyit*”. In none of the verses of the holy Quran the word *Maytah* has been used for human dead body. This clearly shows that a human dead body is not included within the meaning of the word “*Maytah*” because the human dead body was not included in the food of the Arabs, nor did they apply this term in this context to a human dead body. It is undisputed that the Qur’an has been revealed in the known phraseology of the Arabs. To include the human dead body in the word “*Maytah*” shall thus be contrary to both the meaning of the Qur’an and the usage of the Arabs. In this respect, the viewpoint of the Hanafi ‘*Ulemā* is that using other’s or one’s own body or any part of body, whether dead or alive, for treatment (as in the case of grafting) or for food in any condition, or situation, even in the state of extreme necessity to save one’s life is not valid. They uphold the concept of human dignity in extreme situation too.

Scientific progress :

One may say that the science of surgery and art of grafting was not so developed in good old days. But the reply would be that the basis

of the concept of human dignity, in fact, is not dependant on the existence of the possibility or impossibility of grafting at a certain point of time. If the basis of Shari'ah's biddings had been subject to scientific inventions and physical experiments, a change in its ordinances must have necessarily followed with the passing of each century, and God alone knows what shape the rules of Shari'ah would have taken, in as much as, in every succeeding period the scientific inventions and views themselves are progressively getting amended. The distinction and gradation that Islam envisages and observes in human acts and deeds, pure and impure, lawful and unlawful are not even touched upon in other systems of law.

In the light of the above discussion, this writer comes to the conclusion that normally the making a Will by a Muslim regarding of his limb in favour of a certain person or institution shall be invalid. This act, according to classical view, shall necessarily intermeddle with a legacy of which he is neither the owner nor entitled to such use. Besides, the relevant Will shall relate to an entity (limb) which is forbidden to be gifted, either *in presenti* or contingent on death. Hence such a will shall normally be invalid and not enforceable in law.

The Doctrine of Necessity :

The objection regarding the ownership of a human being over his body and soul may be answered thus : Man is deemed to be owner of his body for certain purposes. The Shari'ah, in case a crime is committed by a person in respect of the whole or any part of the human body of another, imposes *Qisās* on the culprit. However, in cases the nature of injury is such that its *Qisās* is not possible or that the injured person is ready to forego the *Qisās* on receiving payment of blood-money (*diyat*) mutual compromise has been allowed. This shows that the offender has inter-meddled into the property of another and that is why, he has been punished. Further, the acceptance of *diyat* proves that the part of human body is valuable. So it can be said that for certain purposes a person is the owner of his body (including its part), though at the same time he is not entitled to effect a sale or make gift in respect of any part of his body in his lifetime, with or without consideration because it is deemed against the basic and fundamental norm of the functioning of this universe, as ordained by Allah, the Almighty. But different considerations will apply to a gift by will, to take effect after one's own death, when the normal functioning of the body of the legator alongwith his soul is to come to its

destined end, but the same can be continued, at least in the case of eye with another blind person on transplantation of its cornea.

Thus, the making of Will regarding one's eyes without any consideration in favour of another may be held permissible *in case of extreme necessity*, if the conditions formulated in the Section hereinabove properly adhered to. The condition of extreme necessity is mainly based on the doctrine of *istihsān* that the needs of living human being are preferred over the dead, the prohibitions are turned into lawful (permissible) in case of extreme necessity and in presence of two injuries the lesser one is to be accepted. Thus, for example, if the loss of eye-sight is compared with loss of respect to the dead body it is manifest that the loss of the latter is meager. The condition of obtaining permission of the heirs of the legator is based on the recent verdicts (fatāwā) of the 'Ulama of Egypt and Jordan and Sa'udi Arabia,⁶⁴ as the heirs have a right over the corpse, and a duty has been cast on them by Shari'ah to bury the dead body in its entirety.

The question of one's good intention to benefit the humanity is, of course, very much relevant here. It is correct that one's intention can turn unlawful into lawful. But we have to draw a line of demarcation between the things and acts unlawful (*ḥarām*) in which there is clear direct *naṣṣ* (text) of the Holy Qur'ān or the Sunnah of the Prophet, and things and acts which are deemed to be unlawful (*ḥarām*) by implication and drawing inferences by means of *Qiyās*. The question is, if the making of a Will by a legator donating, after death, a part of his body for the benefit of a person standing in extreme need is held to be unlawful (*ḥarām*) just as wine, hog, or *riba* or adultery, the position would have been quite different, but here it is made unlawful not because of its intrinsic impurity but due to its inherent reverence. Furthermore, the act (of grafting) is prohibited in clear and absolute terms and in all situations by any injunction of the Book of Allah or the word or act of His Prophet. We can, therefore, apply the process of *ijtihād*, in such a situation, and find out the intention and spirit of the Qur'anic verses and the Prophet's traditions regarding paying respect to a dead body and prohibiting use of its parts. In normal circumstances, full adherence will be given to these dictates.

⁶⁴Eye Donation, Eye Bank, Karachi, *Fikr-o-Nazar*, Islamic Research Institute, Islamabad, 1978, *Al-Majallah al-Buhūth al-Islamiyah*, Mecca, volume Number 4, Article on :

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biddings, but in the event of extreme necessity when the life or welfare of another person rests exclusively and absolutely on grafting of human limb, the Will should be held as valid and enforceable as, in such a case, the motive and purpose is not to disfigure the human body, but to give life or provide real human purposeful working to the other soul. It is with this underlying idea and spirit that the 'ulamā of Egypt, Jordan and lately of Sa'udi Arabia have given their verdicts allowing postmortem for the purposes of knowing the cause of one's secret death on account of some deadly epidemic or for knowing the nature of crime or for acquiring better understanding and knowledge in the science of anatomy and its teaching to student of medicine and surgery. Same is the verdict of these 'ulamā regarding the validity of transplantation of eye cornea to a blind man which is based on several juristic principles quoted above, but it has been limited to those persons only who leave behind no heirs or have been sentenced to death in *Qisās* by a court of law.

So far as the Qur'anic dictates relating to human respect and dignity are concerned, ordinarily they must be adhered to. The observance of the precepts of the Prophet regarding the showing of respect for dead bodies is also incumbent. But, in the above circumstance, the exception made relates to the state of extreme necessity when there is no other alternative. There is never the intention of showing disrespect to the dead body or putting it to the distress. For instance, a man falls into a well. There is an instant and extreme necessity of the water of the well for the inhabitants without which there is the risk of their dying for want of it. There is no way of taking out of that man's dead body from that well except by putting it to sufferance. The permission for doing so may be given provided there is no other alternative, because the injury in putting a dead body to sufferance is lesser than in killing the whole inhabitant by thirst, when there is an imminent danger of death of the inhabitants and the water is not available. Likewise, if a person under extreme necessity does not get clothes to cover his body except the shroud of a dead body the shroud shall be given over to him because the covering of the body of a living human being and his respect are preferable to the respect shown to a dead body. Likewise, if a pregnant woman dies and the child in her womb is alive, the child may be extricated after operating the womb of the dead pregnant woman, provided there is surety of the child being alive. Ibn Qudamah Maqdisi has mentioned these case in his book "*Al-Mughni*", Cairo 1376 A.H. Vol. II, p. 540-41 and 551. There is yet another example of two

persons who are sailing in a boat, and the boat, because of heavy weight, is likely to be drowned and set in the sea and there is no other way except that one person leaves the boat. In such a case some of the jurists have laid down a rule that by drawing lot one person may be thrown out of the boat, no matter he meets his death by such act, because it is better to save one life when there is the risk of losing two. (See Majallah Al-Buhuth al-Islamiyyah, Vol. I, No. 4, Discussion on *Tashrīḥ Juththah al-Muslim*, Riyadh, Sa'udi Arabia, pp. 21-34). These instances prove that in some cases the respectability of a dead human body may be over-looked for attaining some higher good.

Note : The writer had earlier expressed his view in his Urdu work, *Majmu'ah Qawanin Islam* (Vol. IV, pp. 1417-40) published by the Islamic Research Institut, 1973 that a Will for eyes is illegal. The recent researches and verdicts of the 'Ulma of Egypt, Jordan and Sa'udi Arabia express a contrary view. These jurists have, however, not discussed the point of grafting of a "dead" (impure) human part to a "living human body." On further consideration of the matter the writer has changed his view with certain conditions, as discussed above, provided that the application of the rule of *'idḡarār* is extended to cases other than life-saving and the separated part of human body is not held as *maytah* and impure, about which the mind is not clear. (Allah Knoweth the Best).

Section 253. The obtained increase annexed to the legacy shall be considered as included in the Will.

Increase in the legacy

COMMENTARY

Abu Zahra, a famous theologian of Egypt, writes that "proprietary right gets vested from the time of death (of the legator). If there is an increase in the legacy that also shall belong to the legatee from the time of the death (of the legator). Likewise, if the legacy is developed the expenses incurred on developing, protecting, improving or maintaining it (the legacy) shall be the responsibility of the legatee from the time of the death (of the legator)".⁶⁵ It is evident that the responsibility of bearing the expenses is because of ownership of the property. The one who is the owner (of the property) shall have to bear its expenses.

Section 254. (1) When there is some such ambiguity in the words of the legator's Will which can be resolved, it shall be valid and enforceable, even though the ambiguity may be in ascertainment of the quantum of the legacy.

Ambiguity of legacy

⁶⁵ Abu Zahra : *Ahkām al-Wasiyyat*, Cairo, p. 16.

(2) The description of the legacy (the property included in the Will) shall be considered to be the same at the time of death of the legator, unless there is an intention to the contrary in the Will.

COMMENTARY

Hanafi Law :

If the legacy is unascertained and ambiguous but it can be ascertained and ambiguity can be resolved, the Will shall be valid. In the event of the legacy being unascertained and ambiguous there may arise two situations : One is that the ambiguity is in the quantum respecting which the Will has been made; second, the ambiguity is in the accounting of the quantum. For instance, the legator makes a Will in favour of one in these words, "A part of my property or a share in my property or some portion of my property". In such a case, if the legator has at any time specified it, the same shall form the legacy. If he failed to explain, it shall, then, after the death of the legator, depend upon the discretion of the heirs of the legator to give to the legatee by way of Will whatever they think fit.⁶⁶

If a Will regarding more than one-third is made in favour of two persons and the two legatees have equal rights and the heirs do not permit the Will in excess to be put into effect, the two legatees shall get equal shares in the one-third. If the two are not equal in the degree of their entitlement e.g. the Will in favour of one is respecting one-third and in favour of the other it is more than one-third, only one-third of the estate shall be divided equally between the two.⁶⁷ This is the practice recommended by Imam Abu Hanifah.

According to Şāhibayn (his two illustrious disciples), in case of the Will being for more than one-third it shall be divided in proportion to the share of each in the one-third. If the Will has been made regarding one-third in favour of one and two-third in favour of the other, then one-third of the estate shall be divided into three shares, one share going to the one entitled to one-third and two shares to the other one. According to this writer the point of view of Sahibayn appears to be sound and preferable.

If a person makes a Will saying that the shares of his son and daughter in the estate be given to such and such person, then in the presence of the

⁶⁶Al-Kasani : op. cit., vol. vii, p. 356.

⁶⁷Qadri Pasha : *Ahkām al-Shari'yyah*, Cairo, 1895 A.D., section 548.

son or daughter of the legator, the Will (because of these words) shall be void, as the shares of the sons and daughters have been fixed for them in the Qur'ān, they cannot be deprived of their shares by bequeathing them to others. But if the word "*mithl*", i. e. "similar" is added, viz. that shares "similar" to his son and daughter be given to the two named legatees the Will shall be valid, because by the addition of the word, '*similar*' the intention of depriving of the son and daughter of their due shares cannot be logically deduced; rather it shall be understood that the legatee shall receive out of the estate a share in proportion to those received by the real heirs. If the legator has one son the legatee shall be given half of the estate and the quantum of the estate in excess of one-third shall depend upon the permission of the son. If he permits, the entire half (i. e. including the excess) shall be given to the legatee. If the heir does not so permit, the legatee shall be given only to the extent of one-third of the estate. If the legator has two sons, the legatee shall then get one-third, because the Will specifies a share 'similar' to that of the son in favour of the legatee. The property shall thus be divided into three shares : one share going to each of them and in that case there shall arise no occasion for the heir's permission.⁶⁸

Maliki Law :

In case of ambiguity in the quantum of the legacy the Will ought to be put into effect to the extent of one-third. If one-third of the property is not sufficient for putting it into effect the following rules of priority shall be observed:—

- (1) Getting freed Muslim prisoners from the non-believers.
- (2) Paying dower to the wife whose husband suffering from death-illness contracts marriage with her and dies after consummation.
- (3) Paying *Zakāt* (prescribed alms) due, from the one-third. If the taxable year for payment of *Zakāt* is, at the time of the death of the legator, coming to an end and the legator makes a Will for the payment thereof, it shall be paid from the entire property.
- (4) Charitable levy for *Eid al-Fitr*.
- (5) Expiation for *Zihar*, and for murder and then for breach of oath.

⁶⁸Al-Kasani : op. cit, vol. vii, p. 358.

- (6) Expiation for Ramaḍān fasting, for compensatory charity and then for Haj pilgrimage.⁶⁹

If the legator makes a Will saying make so and so an heir alongwith the son or directs for his inclusion as an heir with the son, in such a case it shall be considered an addition of one legatee as a son in the number of legator's sons. The said legatee shall be held to be the second son in presence of one son, third son in presence of two sons, and fourth son in presence of three sons. If the legator says that he be given double the share of his son the Maliki jurists have a difference on this question. The prevailing view is that he shall be given double the share of his son,⁷⁰ (provided it is not more than one-third of the entire property).

Shafi'i Law :

If a person makes a Will of one-third of his property for the performance of Haj pilgrimage or for the payment of debts and alongwith it makes the Will for other charitable matters as well, then according to one view, the one-third shall be divided equally on all of them. If the quantity, compared to the expenses on the pilgrimage and payment of debts, out of one-third of the property, is not sufficient to cover the pilgrimage or debts the same shall be augmented from the original property. The other view, however, is that after giving priority, to the pilgrimage and the debts whatever remains shall be spent over other charities.⁷¹ If the legator makes a Will regarding a share similar to that of one of his heirs the Will shall take effect regarding a quantity similar to that of his heir receiving the least share because he too is one of his heirs. If a Will is made regarding a share similar to that of his son it shall be considered a Will regarding half of the property, provided he has only one son. If he has two sons and in the Will he says that the legatee be given a quantum similar to that of one, the legatee shall be given one-third of the legacy. If in the Will it is said thus "Twice the share of any one of my sons be given," the legatee shall be given twice the share of any one of his sons. The limit of one-third shall, however, be maintained, which if exceeds, shall depend for its validity on the consent of the legator's heirs.

⁶⁹Al-Ābi : *Jawāhar al-Aklil*, Cairo, vol. ii, pp. 222-23.

⁷⁰Ibid, p. 224.

⁷¹Al-Ferozabadi : *Al-Muhazzab*, Cairo, vol. i, p. 461.

Hanbali Law :

If a Will is made with the word 'portion' or 'instalment' or 'part', the heir shall have the right, in such a case, to give away to the legatee from the property of the deceased whatever he thinks proper. Indeed if the word *Siham* has been used, in that case, the sixth part of (the estate) shall have to be given away.⁷² In Arab countries the word '*Siham*' is generally used for one-sixth. In Indo-Pakistan, the word *Siham* is commonly used in the meaning of part or portion. Thus, according to this writer, the interpretation of *Siham* should depend upon the discretion of the heir of giving to the legatee any part of the property he likes.

If the legator makes a Will regarding a share similar to that of a specified heir or similar to that of an heir (unspecified) and he has two sons, in that case, the legatee shall be given one-third of the property. If he has three sons, then one-fourth of the property shall be so given. In like manner a ratio with the shares of the heirs shall be duly maintained. If he makes a Will regarding a share similar to the share of such an (specified) heir whose share in the inheritance has lapsed under the law, in that case, the legatee shall get nothing and the Will shall become void.

Shi'ah Law :

If the quantum of legacy is a vague one, for instance, a person makes a Will regarding a part of his property, there are two views recorded in such a case. One is to the effect that it shall take effect in the tenth part of the estate. The other is that it shall be put into effect in one-seventh ($1/7$) of one-third ($1/3$). If the Will is made with the word 'share', only an eighth part ($1/8$) of the estate shall be covered, If the Will is made regarding 'a property' it shall be taken to mean one-sixth ($1/6$) of the estate. If the Will is made regarding several matters and the legator forgets to mention the detail about a matter it shall, then, be taken to be a matter of any kind of charity. One weak view is that the property in that case shall be held to form part of the estate.⁷³ All these assertions stand in need of their being interpreted in the light of usages.

If after one Will another Will contrary to the first one is made, the second Will shall be enforceable,⁷⁴ i.e. this act of the legator shall be considered as having revoked the first Will.

⁷²Al-Maqdisi, Sharafuddin : op. cit., vol. iii, p. 730.

⁷³Al-Hilli : op. cit., p. 260.

⁷⁴Ibid, p. 261.

Zahiri Rule :

If a legator makes a Will regarding several matters and his property is not sufficient to cover all the matters under the Will, those matters under Will shall, till the quantum of one-third of the estate is exhausted, be implemented in the order of their precedence in mentioning them. The Will regarding the rest of the matters shall become void. If the matters under Will have been left vague a comparison in importance of matters under Will shall be made. The '*Ulamā*' differ among themselves regarding the principle of preference to a matter as a result of comparison. According to Zahiris, the matter which is of higher degree shall be carried out to the extent of one-third.⁷⁵

Modern Legislation :*Egyptian law (of Wills) :*

Section 40. If a legator makes a Will regarding a quantity similar to the share of a specified heir it shall be valid for the legatee to take from the estate a share similar to that of the specified heir and the legatee shall be added to the category of heir, specified by the legator.

Section 41. In the event of a Will made of a share without fixation of any of the heirs of the legator the legatee shall be entitled to a share equal to any one of the heirs provided the legator's heirs have equal shares. If there is difference in the shares of the heirs the legatee shall be entitled to the legacy in accordance with the share of that heir who has the smallest part as his share.

Pakistan Rulings :

Sajjad Ahmad Jan and Shakirullah Jan JJ. in the case of '*Zaib-un-Nisa vs. Atta Shabbir*' (PLD 1966 Peshawar, 147) have held that "The present is a case of a composite Will in favour of an heir and non-heirs of the whole of the property of the testator without the consent of the other heirs. The will has, therefore, to be struck down as void in its entirety. The principle of the first-named legatee getting the property to the extent of one-third as his divisible share, applies to a case where a valid will is created in favour of more than one person and where if the disposition exceeds one-third, the respective shares of the different legatees are specified. In the present case,

⁷⁵Ibn Hazm : *Al-Muḥallā*, vol. iv, p. 406.

the bequest covers the whole of the property of the testator without any specification of shares. The principal thing in the interpretation of a document, including a Will, is to gather the intention of the author. It could not possibly have been the intention of the testator in this case that under his Will any of his legatees should get any share to the exclusion of the other. In other words, it was a case of the collective disposition by him in favour of his legatees, and the integrity of the Will cannot be broken to uphold the disposition of the legal one-third in favour of the first-named legatees. If the will could be upheld to the extent of one-third, that one-third must be shared equally between all the legatees, but as unfortunately the Will is void as a whole, the testator having exceeded his legal bounds, no effect can be given to it”.

Section 255. (1) In case of impediments to a Will created by
 Impediment to the refusal of heirs, division of the legacy shall
 Will be effected among the legatees in accordance
 with the shares proposed by the legator.

(2) In Wills concerning pious purposes, regard shall be had to the degree of importance of the said purpose that for obligatory purpose over the prescribed purpose, and for the Sunnah over the voluntary or superogatory one.

(3) In case of there being impediment placed in implementation regarding particular persons and pious and charitable matters, payment of *Zakāt* shall be given preference over implementing of Will in favour of particular persons.

COMMENTARY

The impediment to Wills in effect means that where legatees are numerous and one-third property is not sufficient for all the legatees and the heirs do not give permission to execution or if they do give permission the legacy is not sufficient to be fully implemented in favour of all the legatees, then, it shall be considered that there is impediment to the Wills, in as much as putting the entire Will into effect shall not be possible. If one-third property is sufficient for all the matters or legatees under Will or the entire estate is sufficient for all of them and the heirs have given their consent or there is no heir, in all such circumstances, the entire Will shall be put into effect and no question of impediment shall arise.

Optional Wills are generally of three kinds :—

- (1) Entire Will is in favour of persons and not for public charities (in the way of *Allāh*).
- (2) Entire Will is for public charities (in the way of *Allāh*).
- (3) Will is partly in favour of particular persons and partly for public purposes (in the way of *Allāh*).

In the first case it shall have to be seen whether the heirs have given their consent to it or not. If they have not given the consent and one-third of the property is not sufficient to cover all the Wills, the one-third shall be divided between the legatees in proportion to the proposed shares made by the legator. For instance, if there is $\frac{1}{4}$ share of one legatee, $\frac{1}{4}$ share of another legatee and $\frac{1}{6}$ share of the third legatee, taking the fraction of $\frac{1}{3}$ of the legacy it shall be divided proportionately among them. If a Will is of more than $\frac{1}{3}$ it shall be considered as being merely of $\frac{1}{3}$ and it shall be held to be impediment to the rest of the Will. For instance, a person makes a Will of half the property in favour of one and one-third in favour of another person and the heirs do not give their consent, the one-third quantum shall, then, be divided half and half between the two legatees because the Will which is (totally) of more than one-third has an impediment and hence shall be limited to $\frac{1}{3}$. Hence both the Wills shall be held to be of $\frac{1}{3}$ and thus each legatee proportionately shall get $\frac{1}{6}$ and $\frac{1}{6}$.

These rules shall apply when all the Wills are made in favour of persons. If the Wills are concerning public charities in that case regard shall be had of the degrees. Preference shall be given to obligatory over prescribed and to prescribed over *Sunnat* and to *Sunnat* over supererogatory. If the impediment is found between the same degrees of purposes, the legacy shall be equally divided among them.

The author of *Al-Hidayah* quoting the assertion of Imam Ṭaḥāwī writes that Wills regarding prescribed alms and Haj pilgrimage are both obligatory but so far as prescribed alms is concerned it certainly includes rights of people as well. Hence it shall be expedient to give preference to prescribed alms over Haj pilgrimage. The author of *Al-Hidayah* has further said that a verdict of Imam Abu Yusuf too regarding giving preference to prescribed alms has been reported. But this view appears to be of Imam Muhammad as has been stated in *Al-Mukhtasar*, of Al-Karkhi, and by the authors of *Al-Kifaya*, of *Tuhfah* and by Shaikh Abu Nasr in *Sharah al-Aqta*.

The question of priority and preference arises only in connection with the obligatory and prescribed purpose. There is no mention in Ṭaḥāwī of priority of prescribed alms or Haj pilgrimage over Wills in favour of named persons.

According to this writer, if the Will besides being in favour of a fixed person, is also in respect of the payment of *Zakāt* due against the legator, the payment of *Zakāt*, as compared to the payment to fixed person, should get priority because alongwith an obligation imposed by *Allāh* there is also involved the right of people in need. However, in case of impediment to other pious and charitable matters and fixed persons, the division shall be effected according to their shares provided in the Will itself. In case of non-fixation of shares the property under Will shall equally be divided on both the items.

Shaykh Abu Zahra, a famous scholar of Egypt, writes that if some Wills are in favour of persons and some are for public purposes, in case of impediment in the fixed shares, the Wills in proportion of these shares, shall take effect in one-third of the property. If no limit to shares has been placed and the property is of more than one-third, the legacy in that case shall be divided equally.⁷⁶

If the legator makes a Will in favour of a fixed person and also for some public purpose in case of impediment therein, the Hanafi Imams in accordance with the point of view of Sāhibayn, act on general principles i.e. in case of quantum bequeathed being more than one-third and the heir do not consent, the Will is put into effect (proportionately) between the named persons and the public purpose. No distinction is observed between the named person and public charitable matters, whereas Shafi'i jurists give preference to public purposes over the rights of fixed persons.

Modern Legislation :

Egyptian Law : Under Egyptian Law of Wills compulsory Will has been given preference over all other Wills. The relevant sections on the subject in the Law of Will, 1946 are as under:—

Section 80. When the Will is regarding more than one-third of the estate and the heirs have not given consent to it and it is not sufficient for carrying out the entire Will or the heirs have not given their consent to it

⁷⁶Abu Zahra ; *Ahkām al-Wasiyyat*, Cairo, pp. 236-70.

and the one-third (1/3) is not sufficient for carrying out the Will, the one-third of the property of Will, shall be distributed keeping in view the situation involved in each case. Regard shall, however, be had to give the share in some fixed legacy to the legatee in whose favour the legator has so fixed.

Syrian Law : In Syria the law has been framed in accordance with the Egyptian Law.

Tunisian Law : In Tunisia no provisions regarding this question is found in "*Kitab Al-Wasiyyah*".

Pakistan Rulings :

Pakistan Supreme Court in the case of "*Ehsan Ellahi Versus Hukum Jan*" (PLD 1967, S. C., p. 200). held that the Will must be construed as a whole, reading each part so far as the words allow, consistently with every other part.

CHAPTER XXXII

WASI (The Executor)

Section 256. The testator shall have the right of appointing
Appointment of
'Executor' one or more executors to execute his Will.

COMMENTARY

Appointing an executor means the appointment of an agent or a deputy who is capable of being vested with powers, either absolute or limited, to execute and carry out the directions of the testator contained in the Will.

Generally that person who, under a Will, is given by testator the right to execute his Will after his death is called the 'Executor.' If a testator has not appointed an executor, the court has the right to appoint on his own authority a suitable person as executor for the management and administration of the legacy. Technically, the person appointed by the testator is called 'Executor' and the one appointed by the court is called 'Court Executor'.¹

The appointment of the executor shall be either absolute or limited. If the appointment of the executor is with general powers i.e. in the appointment, for instance it is said, "I appoint or have appointed such a person, or you, the executor for all kinds of my legacy with powers of all kinds of utilization", or for instance it is said, "I have appointed such a person or have appointed you the executor of all kinds of my legacy with powers of all kinds of utilization"; or it is said, "I appoint you as my executor"; or it is said, "you are my executor"; in such instances, the executor shall unanimously have the power to make all sorts of utilizations. If the executor's power is limited, for instance, the right of utilization is given in a particular property of the legacy, or the property of the legacy has been specified to be given only on lease, or only for cultivation, or only to be invested in trade, in such circumstances, it shall have to be considered as to who appointed the executor, whether an officer of the Court or the testator himself. If he is appointed by the Court, in that case, the particular item or the particular property in which he

¹ Ibn Nujaim : *Al-Bahr al-Rā'iq*, Cairo, vol. viii, pp. 457-58.

has been given the right of utilization, the executor shall have the right of utilization in that particular item or property alone but he shall have no right to exceed the same. There is consensus of opinion of Hanafi 'Ulama in this regard, but if, the executor is appointed by the testator in the manner aforesaid, according to Imam Abu Hanifah, he shall have the right of general utilization and will not be limited to any of the said property. According to Imam Muhammad, however, rule regarding this matter of his powers shall be the same as that of the executor appointed by Court. That is to say, his utilization too shall be specific and limited.

The jurists, on the basis of the views of Imam Abu Hanifah, have stated the reason for difference between powers of appointees thus : appointing executor by an official is the appointment of executor by such a person whose official capacity itself is limited (or may be limited); hence utilization made by a person appointed by him shall be of the same degree and nature and limited. As against that of the official, the testator's executor is testator's representative. As the testator in his lifetime is free in his actions so is his representative free in all his own utilizations. In other words, the executor appointed by an official is in the capacity of an agent, whereas the executor appointed by the testator is in the capacity, in effect, of a principal. In the books of *fiqh*, the opinion of Imam Abu Hanifah has been approved by the jurists.² According to this writer the views of Imam Muhammad (and Abu Yusuf) ought to prevail, because the executor gets the right of utilization through a 'Will' only in accordance with the powers bestowed upon him by the testator.

Some stipulations made regarding the appointment of an executor have been held to be enforceable; for instance, a 'Will' is made specifying that such a person shall be the executor till a certain person returns. The existing executor shall according to *Zōhir al-Riwayat*, stand discharged on the return of that person and instead the person so returned shall be held to be the executor.

Similarlay, if a person says in favour of his minor child that he shall, on becoming major, be the executor and till that time certain other person shall be the executor, then, on attaining the age of majority by the child that certain person shall stand discharged and the said stipulation shall be adhered to and acted upon.³

²Ibid, pp. 457-63; *Fatawa 'Alamgiri*, Dewband, vol. iv, p. 249.

³Ibn Nujaim : op. cit., vol. viii, p. 457.

Maliki Practice :

If the executor is appointed with absolute words, he, in that case according to Malikis as well, shall have the right of making all utilizations. If the appointment of the executor is for limited purpose the same shall then be limited one.

Maliki jurists as well are in agreement with Hanafis in respect of attaching a condition with the Will. It is written in '*Al-Mudawwanatul Kubra*' that if one makes a Will saying that certain person shall be the executor until certain other person appears and on such appearance that other shall be the executor, it is perfectly valid. On appearance of that other person he shall become the executor.⁴

Shafi'i Practice :

If a person, according to Shafi'is, is appointed executor for a particular purpose his powers of executorship shall be limited to that particular purpose ; he shall have no right of making other utilizations. If the period of his office of executorship is fixed, he shall not remain the executor on its expiration. His authority of making utilization being based on the permission of the testator, his power also ends, at the end of the permitted period. Attaching a condition to the appointment is correct according to Shafi'is as well.⁵

Hanbali Practice :

Attaching condition of a particular period to the office of executorship or any other stipulation, according to Hanbalis as well, is valid.⁶

Shi'ah Rule :

It is stated in *Shara'i 'al-Islam* that if the testator does not appoint the executor, the official of the Court shall constitute as the care-taker of the deceased's legacy.⁷

Section 257. A male or a female, whether related to the deceased or not, may be appointed as the executor of his Will. Such appointment shall

⁴Al-Sahnūn : *Al-Mudawwatul Kubrā*, Cairo, vol. xv, p. 15, Al-Abi Abul Samī' : *Jawahar al-Aklil*, Cairo, vol. ii, p. 325.

⁵Al-Firozabadi : *Al-Muhazzab*, Cairo, vol. i, p. 471.

⁶Al-Maqdisi Sharafuddin : *Al-Iqnā'*, Cairo, vol. iii, pp. 77-79; Abul Barkat Majd al-Din : *Al-Muharrar*, Cairo, vol. i, p. 376.

⁷Al-Hilli : *Sharā'i al-Islam*, Beirut, pt. ii, p. 265.

not be affected by appointing any other person as guardian of the person and for property of the minor children of the testator.

COMMENTARY

Hanafi Practice :

As a man has the right of making utilization of his property during his lifetime, he likewise is entitled to transfer his rights to someone to be effective after his death whether that someone be a stranger or relative, whether male or female, provided that someone is possessed of the qualifications, which according to Shari'ah, ought to be present in an executor. Hence, a person may appoint his wife to be an executor of his Will in favour of issues. He may likewise appoint as executor any one either the mother, paternal grandmother or the maternal grandmother. In the appointment of the executor there is no condition of his being either an heir or otherwise. Consequently, if a person has a son, a full brother or a uterine brother and he bypassing his son appoints his brother as his executor it shall be valid. Likewise if, in the aforesaid example, there is a daughter and not the son, the appointment of the brother as executor shall equally be valid. If some of the issues of a person are major and some minor and the person appoints one of the major issues as executor, that appointment also shall be valid. If no supervisor over the execution of a Will is appointed by the testator the executor shall have full powers of utilization. The Court shall, however, be an exception to this rule in as much as it possesses supervisory power in all cases. If the testator has appointed a supervisor over the executor he shall, in that case, have the right of supervising the utilizations by the executor.⁸

Maliki Rule :

A female, according to Malikis as well, may be appointed as executor. There is no distinction between man and woman, an heir and non-heir in the matter of being appointed an executor.⁹

Other Views :

Shafi'is too, are on this question, in agreement with the Hanafis and Mālikis,¹⁰ so also the Hanbalis¹¹ and the Shi'as.¹²

⁸Zayd al-Abyāni: *Ahkām al-Shari'yyah*, Cairo, 1920 A.D., vol. ii, p. 41.

⁹Al-Abi : op. cit., vol. ii, p. 326.

¹⁰Al-Firozabadi : op. cit., vol. i, p. 470; Al-Shafi'i : *Kitāb al-Umm*, Cairo, vol. i, p. 12.

¹¹Ibn Qudāmah : *Al-Mughni*, Cairo, vol. vi, p. 569,

¹²Al-Hilli : op. cit., pt. ii, p. 265.

Section 258. The Executor appointed by the father of minor children shall have preferential rights and powers over those of children's grandfather.

If the testator appoints the mother of the children or any other woman as the executor, the grandfather shall have no right of guardianship over the property of the children.

In case the father of the children dies without appointing an executor and the grandfather is there who is capable of holding and controlling and making utilisations of the property, he shall then have the right and powers of making utilisations of the property.

COMMENTARY

Hanafi Practice :

If the testator appoints an absolute executor he, compared to all other persons, shall be entitled to making all kinds of utilisations in the property of the testator and no other person including heirs shall have the right of interfering with his utilisations. This applies even if the grandfather of the children is alive; he too shall have no right to interfere in the utilisations of the executor; because no automatic guardianship of the grandfather in preference to the executor appointed by the father of children is created for the property. In case, however, the father appoints no executor, the grandfather shall have the guardianship over the children and he shall have the power of making utilization in the legacy for meeting out their needs provided the grandfather fulfils all the conditions that are laid down by the Shari'ah for the executor. No other guardian shall, in the presence of the grandfather, have the right of interference, except the Court in as much as its domain is general.¹³

Maliki Practice :

According to Malikis as well the father and the executor appointed by the father shall get preference over other guardians and executors in their utilisations. It is said in '*Al-Mudawwnatul Kubra*', "If there is no executor appointed by the father for his (orphan) children and their grandfather is alive but he is not appointed as executor i. e. the father dies without appointing the grandfather as the executor for his children,

¹³Fatawa 'Alamgiri : op. cit., vol. iv, p. 252; Ibn 'Abidin : *Radd al-Muhtar*, Cairo, 1327 A.H., vol. v, p. 504.

in that case, the grandfather shall himself be competent to make all utilizations for the maintenance of the children. But he shall not have the right of appointing the executor for the orphan children.¹⁴

Shafi'i Practice :

According to Imam Shafi'i the appointment by the father, in presence of the grandfather, of a stranger as an executor for the children shall not be valid provided the grandfather is possessed of all qualifications laid down for the executor. The Imam, as against other jurists, considers the appointment of a stranger as executor to be invalid. Consequently, according to him, the executor appointed by the father shall not get preference over the grandfather.¹⁵

Shi'ah View :

Shi'ahs, on the question of the powers of grandfather, are in agreement with Imam Shafi'i. There is, however, a recent view reported of these people that if the grandfather is present and the testator appoints a stranger as executor, this executor shall have powers to make utilisation only to the extent of one-third of the legacy; the rest of the utilizations shall be made by the grandfather.¹⁶

Section 259. (1) If the executor, in the lifetime of the testator, Acceptance or rejection of executorship accepts the office of executorship he, after the death of the testator, shall have no right of relinquishment except when the testator at the time of appointing the executor specifies that the executor may, whenever he wishes, relieve himself of his responsibilities.

(2) Rejection of the office of executorship in the lifetime and with the knowledge of the testator is valid. Its rejection without bringing it to the knowledge of the testator is not valid.

(3) If the executor, in the lifetime of the testator and to his knowledge rejects the office of executorship, his

¹⁴Al-Ābī : op. cit., vol. ii, p. 325; Al-Sahnūn : op. cit., vol. xv, p. 17.

¹⁵Mughnī al-Muhtāj, Cairo, 1958 A.D., vol. iii, p. 76; Al-Firozabadi : op. cit., vol. ii, p. 456.

¹⁶Al-Hilli : op. cit., pt. ii, p. 265.

acceptance of the office of executorship after the death of the testator shall not be given credit.

(4) If the executor in the lifetime and till death of the testator maintains silence he shall have the option of accepting or rejecting it after the testator's death.

COMMENTARY

The Executor, in Islamic Law of Wills, holds an office of great responsibility. He, in fact, stands as a trustee on behalf of the testator for the performance of the acts in respect of effects (properties) which are made over to him by the testator. Hence the *Shari'at*, respecting the right of acceptance and rejection of the executor, has acted with great caution.

Hanafi Practice :

When someone is appointed an 'Executor' and he, in the lifetime of the testator, after informing him, accepts the office and retains his acceptance till the death of the testator, the executorship shall not be amenable to waiver. He shall not be entitled to relieve himself of this responsibility after the death of the testator except when the testator himself at the time of appointing him as his executor lays down that he may relieve himself of the responsibility and get discharged or the executor himself, to the knowledge of the testator, may have accepted that office with the said condition. If the executor, after acceptance, rejects the office it may be in two ways: Firstly, he may reject it after informing the testator in the same way as he had accepted it after informing him. This rejection shall be valid and he, after the death of the testator, shall not be entitled to make any utilization as an executor. Secondly, he may reject it without the knowledge of the testator who dies without having knowledge of it. The rejection, in the latter course, shall not be valid. If the executor in the lifetime of the testator maintains silence over its acceptance or rejection and the testator in the meantime dies, the executor shall then have the option of either accepting or rejecting it. In the event of his acceptance all the responsibilities of that office shall devolve on him, otherwise not. In the event of his rejection, the Qāḍī (when called upon) shall be required to issue an order appointing, someone else as executor so that the injury caused by the executor's rejection to the heirs of the deceased may be removed.¹⁷ It is said in *Majma' al-Anhur* that if the executor maintains

¹⁷ *Fatāwā 'Alamgiri* : op. cit , vol. iv, p. 247; *Damād Āfandī* : *Majma' al-Anhur*, Cairo, vol. ii, p. 719.

silence in the lifetime of the testator who ultimately dies, in that case, the Executor has the option of either accepting or rejecting the executorship. It is stated to the same effect in *Fatawai Alamgiri*.¹⁸ The reason is that it was possible for the testator before his death to call upon the silent executor to explain the nature of silence and, on his rejection, he could have appointed another executor. When this did not happen it would appear that the testator had high hopes in the executor of accepting it.

Maliki View :

According to Malikis the executor may accept or reject the executorship in the lifetime of the testator but he cannot reject it after testator's death. If he rejects the executorship of the Will after the testator's death and is again prepared to accept it the same shall not be valid. If he maintains silence in the lifetime of the testator he shall have no right of accepting it after the death of the testator.¹⁹

Shafi'i Practice :

According to Shafi'is as well, the acceptance of Will by the executor is a necessary condition. Regarding the time of acceptance there are two reported views of Imam Shafi'i : One is that the acceptance made shall be valid both during the lifetime and after the death of the testator. The other is that the acceptance made after the death of the testator shall be valid, as is valid the acceptance of the legacy by the legatee after the death of the testator.²⁰

Hanbali Rule :

There are, regarding executorship, two reported views from Imam Ahmad : One, that the executorship may be accepted both during the lifetime as well as after the death of the testator. Likewise it may be rejected during lifetime of the testator as well as after his death. In case of rejection, (after death) the order of the Qāqī is essential. The other view is that its rejection in the lifetime of the testator, without its being brought to his knowledge, is not valid, so shall it, on stronger logic, not be valid after the death of the testator.²¹

Shi'ah view:

If the executor rejects the executorship during the lifetime of the testator to his knowledge, the rejection shall be valid. If, however, the

¹⁸Ibid, Ibn Nujaim ; op. cit., vol. viii, p. 457.

¹⁹Al-Ābī : op. cit., vol. ii, p. 327; *Al-Sahnūn* : op. cit., vol. xv, p. 18.

²⁰Al-Firozabadi : op. cit., vol. ii, p. 471.

²¹Abul Barkāt : op. cit., vol. i, p. 392.

testator before or after its rejection dies, without getting knowledge of its rejection, the same shall not be valid, and the executorship shall be an obligatory duty.²²

Section 260. (1) No special words or expression is necessary for the appointment of an executor. It shall indeed be necessary that the word or expression used should clearly indicate the intention of making over the management and administration of the Will to the executor.

(2) Implied acceptance by the executor shall be construed as acceptance by him. Consequently, if the executor, considering it beneficial to the interest of the heirs, sells or makes purchase of a property or makes payments of or realises a debt of the deceased respecting the legacy, the same shall be considered as the acceptance of the office of executorship by him.

COMMENTARY

In the appointment of someone as an executor it is not necessary to appoint him by some special words. It is valid to appoint him with every such word that manifests the fact that the testator has appointed him executor of his Will and for securing the rights of his children and relatives to them after his death. For instance, he says, "you are my representative after my death" or says, "I, after my death, give you the care of my children, you shall be my executor, you protect and take care of my children after my death and the supply of necessities of their lives is entrusted to you."

As the appointment of an executor is not required to be by particular words, it is also not necessary that the executor should accept it expressly; rather the acceptance made impliedly is as valid as the acceptance made expressly. For instance, a person appoints another as executor. The executor maintains silence but after the death of the testator, he sells some property out of the estate or purchases something needed by the heirs, or pays off the debt owed by the deceased out of estate or makes demand for and realises debts of the deceased owed by someone. All these acts by him shall establish his acceptance and shall take effect as if he said, "I accept it". In covenants the meaning and purpose as well are relied

²²Al-Hilli : op. cit., pt. ii, p. 264.

upon, not mere words.^{22a} Consequently, any rejection after making the said utilizations shall not be valid. It shall also be not necessary for him at the time of making his utilizations to be informed of his appointment as an executor. Even if he is not so informed but in fact the testator did appoint him as the executor and he makes any of the said utilizations, he shall be a legal executor.²³

Section 261. It shall be an essential condition for the executor to be Muslim, prudent, mature and trustworthy. Further, he should be well-versed in wordly affairs. If the deceased has appointed an executor who is not possessed of the aforesaid attributes, the Court shall have the authority of removing him and appointing another executor who is possessed of the said attributes.

COMMENTARY

Hanafi View :

That person shall be held to be qualified to be appointed an executor who is possessed of the five attributes noted below :—

1. Be a Muslim.
2. Be prudent.
3. Be mature.
4. Be trustworthy.
5. Be experienced in worldly affairs.

The purpose of entrusting the power of utilization of the legacy to someone through a Will is that he, the executor, may act in a trustworthy manner in the interests of the testator and his progeny taking all steps beneficial (and not injurious) to them and may be able to scrupulously execute and carry out the Will. Hence the one who is not possessed of the said five qualifications would not be able to carry out perfectly the duties assigned to him under the Will.

^{22a} (المجلة) الاعتبار للمقاصد والمعاني لا لالفاظ والمباني

²³ Damād Āfandi: op. cit., vol. ii, p. 719; Ibn Nujaim, vol. viii, p. 457; *Fatawa Alamgiri* : op. cit., vol. iv, p. 247.

Appointing a non-Muslim as an executor is clearly against the clear texts of the Quran. It is said in the Qur'an²⁴, "And never will Allah grant to the unbelievers a way (to triumph) over the Believers." It is apparent that appointing an infidel as an executor is setting him up in full control of every kind of disposition of the property of a Muslim. Similarly, appointing an imprudent man as an executor is injurious to the interest of the heirs which is against the very purpose of the Will. In the same way, in case of a minor being appointed as an executor there shall be the risk of the rights of the heirs not being properly taken care of because the minor, not being capable, shall not be able to protect the rights of the heirs. The person who has no experience of worldly affairs or is untrustworthy, or an embezzler obviously is in no way fit to be appointed as an executor.

Hence it becomes clear that for the executor it is essential to be in possession of all these qualities at one and the same time. If any one of them is lacking it is incumbent upon the *Qādi* to remove the executor from his office and appoint such other person who may prove to be perfectly capable of bringing benefits to the heirs, in as much as the Court is primarily established for keeping watch over affairs conducive to public good. If, however, prior to such removal by the *Qādi*, the cause on account of which his removal was being contemplated vanishes and the said executor can be credited with the required qualities, the Court need not then take steps towards making any change.

If an executor before his being removed by the Court has made some utilization, the Court shall not hold it to be void; rather the same shall be considered to have taken effect, except when the utilization is the cause of great harm and wholly injurious to the heirs. If it is felt that the executor, though possessed of the required qualities, but due to his physical weaknesses is not able to carry out perfectly the purposes of the Will the Court has the power of appointing, on his own, someone as an assistant to the executor.

If the executor is possessed of all those lawful qualities the Court shall have no discretion to remove him merely on the complaint of the heirs unless his dishonesty becomes apparent and established. The executor, according to Hanafis, must from the beginning to the end be in possession of the aforesaid qualities. If he during his tenure of office loses any of the qualities but recovers it afterwards, he may continue to remain executor as of old. A blind person and a woman may also, according to Hanafis, be

²⁴Al-Qur'an, Surah Al-Nisā, IV : 141,

”ولن يجعل الله للكافرين على المؤمنين سبيلاً“

appointed as an executor.²⁵ The point of view of Hanafis respecting the appointment of a blind person as an executor, according to this writer, does not appear to be sound, in as much as the executor, due to his physical disability, cannot carry out fully and satisfactorily his duties regarding utilizations. Although there is no apparent legal difficulty in appointing a woman as executor but, generally speaking, women have little experience of worldly affairs and usually find difficulties in the performance of duties required of them as executors but this may differ from woman to woman.

Maliki View :

The Malikis, in all the aforesaid matters, are in agreement with the Hanafis.²⁶

Shafi'i Practice :

The Shafi'is, in the matter of the aforesaid qualities being requisite for an executor, are in agreement with the Hanafis. But as to the fitness of blind persons they have two reported views. According to one opinion the appointment of a blind person as executor is valid, whereas according to the other it is not, in as much as there are some matters the performance of which by a blind person becomes difficult, rather impossible.²⁷

Hanbali Verdict :

The Hanbali jurists, recognising the aforesaid qualities as conditions, have also held the appointment of a person, whose qualities have remained obscure, as valid. According to them the supervision of an official, in presence of the executor appointed by the deceased who is performing the duties under a Will perfectly well, is meaningless.²⁸

Shi'ah Rule :

According to the Shi'as, it is a condition for the executor to be Muslim, prudent and mature. According to them there are two opinions regarding the quality of his being just. The one is that it is a necessary condition; the other is that it is not a condition. According to them the appointment of a

²⁵*Fatawa 'Alamgiri*, op. cit., vol. iv, pp. 247-48; *Damād Afandi* : op. cit., vol. ii, pp. 719-20.

²⁶*Al-Ābi* : op. cit., vol. ii, p. 326.

²⁷*Al-Shafi'ī* : *Kitāb al-Umm*, op. cit., vol. iv, p. 120; *Al-Firozabadi* : op. cit., vol. i, p. 470; *Mughni al-Muhtāj*, Cairo, vol. iii, p. 74.

²⁸*Al-Maqdisi Sharafuddin* : op. cit., vol. iii, pp. 77-79; *Abul Barkāt* : op. cit., vol. i, p. 392.

minor boy as executor shall be valid when some mature and capable person is also appointed to assist him, otherwise the appointment of a minor as executor shall not be valid.

If two persons are appointed as executors and one of them is a major and the other a minor, in that event the major executor alone shall make the utilizations till the other executor attains majority. He shall, on the other executor getting major, have no power of acting alone. If the minor executor dies or becomes a major but is of dull understanding (or insane), the first one shall alone as of old continue to make utilizations. The Court, in such a case, shall have no right to interfere, because this executor was appointed by the testator himself. The minor executor on attaining his majority shall have no right of invalidating the previous utilizations made by the major executor. The appointment of a woman as executor, according to Shi'as, is also valid when she is possessed of the said qualities.²⁹

Section 262. The testator shall have the right of removing at
 Removal of
 executor
 anytime the executor appointed by him from the
 office of executorship.

COMMENTARY

The executor gets the powers of making utilization in property by and on behalf of the testator. The testator, therefore, has the right of removing the executor appointed by him at any time he chooses whether the executor has accepted the office or not and whether he is present or absent. The executor, according to Imam Abu Hanifah, shall stand removed even if he has no information of his removal. Imam Abu Yusuf, however, maintains that he shall not stand removed in case of his not being so informed. His utilizations made, in that case, shall be effective. If the testator dies after removing the executor and the executor, unaware of his removal, makes utilizations as executor, then according to Imam Abū Yusuf, the utilization shall take effect, whereas according to Imam Abū Hanifah they shall not be effective.³⁰ In the opinion of this writer, the assertion of Imam Abū Yusuf is preferable because in the event of acting in accordance with the assertion of Imam Abū Hanifah if the executor is held removed without the information reaching him and his utilization made are held invalid, the executor personally and the persons who dealt with him shall all stand to lose, in as much as, the executor made those utilization bona-

²⁹Al-Hilli: op. cit., pt. ii, p. 264.

³⁰Al-Haskafi: *Al-Durr al-Mukhtār*, on margin of *Radd al-Muhtār*, Cairo, 1327 A.H., vol. v, p. 495.

fide, considering himself to be the executor and those who dealt with him did so under the impression that he was in fact the executor. Thus the injury to the executor shall extend to others. On the other hand according to the assertion of Imam Abū Yusuf no harm shall ensue to any one.

Views of the Other Schools :

From the study of the Māliki, Shafi'i and Hanbali *fiqh* it appears that the testator has, during his life at all times, the right of removing the executor. Like that of Hanafis, however, no express provision could be found in Māliki and Shafi'i books of *fiqh* under study. It is only in Hanbali book of *fiqh*, "*Al-Iqnā'*" that some details are found there.³¹

Section 263. (1) If the executor appointed by the testator is just and capable of putting the Will into effect, Court's power of removal the Court shall have no authority to remove him. But, the Court shall have the authority, on the ground of the executor being partially incapable of carrying out certain duties, of appointing as executor one more person with him.

(2) If the Court is satisfied that the executor is in fact totally incapable of putting the Will into execution it may appoint in his place another person as executor. If, however, the executor so removed at any time in future becomes capable of putting the Will into execution it shall be obligatory upon the Court to re-instate him.

(3) Notwithstanding any provision to the contrary, the executor may be removed from his office by the Court on account of being guilty of the breach of trust.

COMMENTARY

Hanafi Law :

The executors, on the basis of their attributes, may be classified into three kind. The first is one who is just and is capable of performing all the duties relating to the office of executorship. The second is the one who is "not sufficiently just" and cannot perfectly carry out the duties relating to the office of executorship. The third is the one who lacks integrity (is unscrupulous) from whom there is an apprehension of misuse and misapplication of

³¹Al-Maqdisi : op. cit., vol. iii, p. 79.

assets. If the executor belongs to the first kind the Court cannot remove him without any lawful cause. In this connection, however, there are two reported opinions among the Hanafi jurists. According to some of them, he shall stand removed by the order of the Court in any case. The other group maintains that he shall not stand removed. When he is duly possessed of all those attributes that are prescribed for the office of executorship and the rights of all the beneficeaus are being met fully, there is no reason why should he be removed from his office. There seems to be continued disagreement among jurists on giving preference to one of the said two assertions over the other. But as the Court has general powers of supervision, the executor, if so removed by the Court, according to this writer, shall stand removed. If the executor is of the second kind and he, inspite of being just, is not able to carry out all matters under the Will in a manner that fulfils the purpose of the Will, the Court in that case shall not remove him but would under its authority appoint another trustworthy person as co-executor so that the handicap is removed. If the executor is just but is totally unable to carry out the matters under the Will, the Court in that case shall have the power to replace him if it deems expedient. But if the executor at some future time, regains the necessary capabilities, he shall, as of old, be re-appointed as executor. If the executor is of the third kind, that is, if he is unscrupulous and the property of the legator is involved in the risk of being lost, wasted or damaged because of him it shall be obligatory upon the Court to remove him and appoint in his place a just and trustworthy person. The Court has the power and duty of making this change, as the deceased himself is unable to remove him and appoint his substitute. As long as the executor is just and is capable of performing the matters under Will, the Court shall not remove him. However, if the executor commits breach of trust and the same is proved to the satisfaction of the Court in a proper manner, it shall be the duty of the Court to remove the executor and appoint in his place a just and trustworthy person. Had the testator himself been alive he would have in the circumstances removed the executor and appointed another person. After his death, this power gets vested in the Court.³²

The Other Views :

According to Imam Malik, Imam Shafi'i and Imam Ahmed Ibn Hanbal as well, provisions of law regarding this question is the same as that of the Hanafis. The only difference, however, is, as it appears from the discussions

³²*Fatawa 'Alamgiri*, op. cit., vol. iv, p. 248; Damād Āfandi : op. cit., vol. ii, p. 719; Al-Marghīnani Burhanuddin : *Al-Hidayah*, Karachi, vol. iv, p. 496; Al-Haskafi : op. cit., vol. v, p. 496.

in books of *fiqh*, that the said attributes of the executor on becoming extinct, or on his breach of trust having been proved, the executor shall automatically stand removed and the Court shall, in his place, appoint another person as executor.³³ According to this writer, the point of view of the Hanafis is preferable. The executor shall stand removed on his dismissal by the Court i.e. he shall remain an executor as long as he is not removed by the Court. The persons who may have had dealings with him *bonafide* shall thus be protected from loss. The Shi'a jurists as well, on this question, are in agreement with the Sunnis.³⁴

Section 264. Where there is no executor of the Will of the Court's power of deceased invested with the power and there is a appointment debt due from the deceased or a debt of the deceased due from other persons or there is his Will to be given effect to and there is no heir either to pay off or realise his debt due or to put that Will into effect or there is an heir but he is minor, the Court, then, shall have the power of appointing on its own a competent person as executor.

COMMENTARY

Hanafi Law :

If a person dies without appointing a person as his executor, but the father of the deceased i. e. the grandfather of the children of the deceased is alive and is possessed of the requisite attributes, he shall have the power of making utilizations and of acting as the guardian of the orphans. If the grandfather is not alive or if he is alive but is not possessed of the required attributes, the right of making utilizations in the property of the deceased and the guardianship of person including maintenance of his children shall get vested in the Court (*Qāḍī*). He may either perform the duties himself or may on his own appoint some just and trustworthy person as executor.

As the *Qāḍī's* jurisdiction to appoint the executor is on account of necessity, he shall appoint the executor only when such contingency arises. Hence appointing of the executor by the *Qāḍī* on his own shall be correct in the following circumstances :

³³Al-Ābi : op. cit., vol. ii, p. 226; Al-Shafi'i : *Kitāb al-Umm*, op. cit., vol. i, p. 120; Al-Firozabadi : *Al-Muhazzab*, vol. i, p. 470; Al-Maqdisi : op. cit., vol. iii, pp. 77-79; Al-Kharqī : *Al-Mukhtaṣar*, p. 115; Abul Barkāt : *Al-Muharrar*, vol. i, p. 392.

³⁴Al-Hilli : op. cit., pt. ii, p. 264.

1. When there is a debt due on the deceased and there is no heir answerable to the creditor on behalf of the deceased. If the *Qāḍī* in such a case does not appoint the executor, the creditor shall be put to loss.
2. When there is a debt of the deceased due from someone and a demand for the same cannot be made as there is no heir of the deceased.
3. When the deceased has made a Will regarding some property in favour of a particular person and there is no heir or executor of the deceased so that the legatee may receive the legacy through his presence, the *Qāḍī* shall appoint an executor so that the legacy may be taken possession of through his presence.
4. When all or some of the heirs of the deceased are minors, their executor shall be appointed so that he may take care of those minors.
5. When a minor child inherits a property from its mother, and although the child's father is alive yet he is not capable of being a guardian because of his being spendthrift and likely to misappropriate the child's property, the *Qāḍī*, in such an event, shall appoint a capable person as executor so that the property of the child may be saved from being wasted.
6. When the whereabouts of the father of minor children become unknown and the information of his being alive or dead is not available and there arises the necessity for safeguarding the children's rights and for taking care of them, the appointment of the executor by the *Qāḍī* shall become obligatory.
7. When other persons' debts are due against the estate and the heirs of the deceased are asked to pay back the debts but they avoid it, the *Qāḍī* shall appoint an executor for the payment of debts of the creditors.³⁵

Other Views :

The three Imams, Malik, Shafi'i and Ahmad Ibn Hanbal are in agreement with the Hanafis on the question of appointing executor by the *Qāḍī*.³⁶ The Shi'ah as well are, in this connection, in agreement with the Sunni Schools of law.³⁷

³⁵*Fatawa 'Alamgiri*, op. cit., vol. iv, pp. 250-52; Ibn Abidin : *Radd al-Muhtar*, Cairo, 1327 A.H., vol. v, pp. 495-96; Qāḍī Samawah : *Jāmi' al-Fusulayn*, Cairo, 1301 A.H., vol. ii, p. 12.

³⁶Al-Firozabadi : op. cit., vol. i, p. 470; Ibn Qudamah : *Al-Mughni*, Cairo, vol. vi, p. 572.

³⁷Al-Hilli : op. cit., vol. ii, p. 264.

Section 265. When the deceased or a competent Court has ^{Exercise of powers individually or jointly} appointed two persons as executors it shall not be valid for each of them to make individually any utilization of permanent nature. If one executor makes such a utilization it shall not take effect unless the other executor consents to it. The following matters shall, however, stand exempted from this rule:—

- (1) Funeral rites and ceremonies of the deceased;
- (2) Taking steps for enforcing the rights of the deceased against others, and safeguarding them;
- (3) Paying of proved debts due on the deceased out of the property of the deceased which is similar in nature to the debt;
- (4) Putting into effect the Will regarding a particular property in favour of an appointed legatee;
- (5) Supplying the necessities of life to the minor children of the deceased;
- (6) Accepting gifts made in favour of the minor children of the deceased;
- (7) Employing the minor children of the deceased in some useful job;
- (8) Giving on rent the properties of the minor children of the deceased;
- (9) Returning the property borrowed and kept in trust by the deceased and returning the property usurped or purchased under *bay' fāsīd* (irregular sale) by the deceased.
- (10) Getting the divisible property partitioned from the co-sharers of the deceased;
- (11) Selling the property that is liable to go waste or stale;
- (12) Collecting the different properties that may get destroyed;

Provided that if the deceased has specified some individual or joint action regarding a particular matter the same, as far as possible, is to be so performed except when the doctrine of necessity demands otherwise.

COMMENTARY

Hanafi Practice :

If the legator appoints two executors, or in the event of there being no executor the Court appoints two executors, both of them are given in clear terms individual right of making permanent utilizations, for instance, it is said "I appoint both of you as my executors and both of you have the right of making utilizations of permanent nature individually", in such a case, the executors shall be under no obligation of obtaining consent of each other; rather each of them shall be entitled to make utilizations individually. Or if the legator specifies the utilizations to be made by both of them jointly; for instance, he says, "I appoint both of you as my executors you both shall make the utilizations jointly, and you shall not make the utilizations individually, in such a case, the executors shall have to act according to what has been earlier said. It may also happen that the legator specifies nothing in the deed of Will. He merely says, "I appoint both of you as my executors". Imam Abu Yusuf, in such a case, says, "Each executor, in the act of making utilizations, shall be competent individually", whereas Imam Abu Hanifah and Imam Muhammad maintain that such executors shall not have the right of making utilization individually. Hence, if an executor makes some utilization without the consent of the other executor then according to Imam Abu Yusuf it shall take effect but according to the two Imams (Abu Hanifah and Imam Muhammad) it shall take effect when the other executor gives his consent to it; if he refuses, the same shall become void. It makes no difference if the legator has made their appointments under one covenant or under separate covenants one after the other. Imam Abu Yusuf, in support of his view, says that the appointment of executor amounts to transferring one's authority to the other. When it is transferred to two persons, each of them gets complete authority according to him, as is the case in a marriage contract that two brothers in getting their sister contracted into marriage are guardians in their own right individually. Appointing someone as executor is appointing him as one's own substitute in the matter of making such utilizations to which the legator himself is entitled. The legator being individually and permanently entitled to make utilizations his appointee too shall be completely and absolutely empowered to make the utilizations individually. Imams Abu Hanifah and Muhammad maintain that the executorship takes effect after the death of the legator; hence both the executors should make jointly the utilizations, specially when the condition of joint utilization is beneficial too; in as much as the opinion of two persons carries more weight than the opinion of only one person. The legator by appointing two persons as executors delegates

his authority to the joint personality of both the persons, not to the personality of only one of them. Each executor in his place shall thus have a quantum of authority only in the fulfilment of the intent and purpose of the legator; and only by the exercise of a quantum of power the desired effect is not achieved. As against this, in case of a marriage contract, the two brothers are by themselves equally and fully related to their sister individually. Each brother is, therefore, independent of the other in the matter of his right of getting the sister contracted into marriage.

In the opinion of this writer the argument of the two Imams, Abu Hanifah and Muhammad appears to be more weighty, yet these two Imams have departed from applying their view in several matters, in the following circumstances, namely :—

- (i) Delay in making utilization shall entail the risk of causing harm to the interest of the heirs or the legatees.
- (ii) The matter in its very nature be such that it does not require the consultation of the other executor.

In such cases, according to Imams Abu Hanifah and Muhammad as well, each executor may individually make the utilization which shall be valid. According to all the Hanafi doctors of *fiqh*, therefore, the utilization made by executor individually shall be valid in the following cases :—

1. Each executor shall individually be entitled to make utilization for the funeral rites and ceremonies connected with the deceased. (Rather, it may be said that the matter is not such which is dependent on executorship. That is why, performing the funeral rites and ceremonies of the deceased by neighbours and co-travellers has been legally held to be valid, and in some events incumbent).
2. Appearance of any one of the executors in the court and looking after the case regarding the rights of the deceased due on others shall be valid.
3. When there is a debt of the deceased due from others, each of the executors shall individually have the right of making demand of that debt (but their individual recovery of it shall not be valid).
4. The payment of the debts, by the executor proved due on the legator and demanded of the executor, from the property of the same species as that of the debts, shall be valid. Payment from

the property of different species shall not be valid as long as both the executors do not jointly make the payment.

5. When the Will is made of a particular property in favour of a particular person; for instance the legator says, "This house of mine, after me, be given to so and so, the particular person", in such an event each executor alone may make over the house to the legatee in as much as in such a case no consultation is required.
6. Supplying individually of articles constituting material necessities of life for the legator's children shall be valid as delay in such matters shall be the cause of doing harm to them. The executor, then, shall have such prior right in as much as the office of executorship is delegated to him as against the guardian of the person of the minor.
7. Accepting gift made by a legator in favour of the children in as much as the delay in its acceptance may cause the legacy being lost.
8. Letting the property of the legator on rent. The act though it requires the consent of the other executor, but owing to delay there may occur the risk of the property being damaged. The risk that may occur to the property being let out may be obviated by the cancellation of the rent deed. It also, however, appears from the jurists' elucidations that the unanimity of the opinions of both the executors is essential, because the two executors, in this respect, are like the two *Mutawallis* of a *Waqf* in the matter of transferring property on lease. It is, thus, essential that they both jointly execute the lease deed.
9. In the case of properties that are placed as trust (*amānat*) or loan (*'āriyat*) with the testator, and those specific properties belong to particular individuals, if there are two executors appointed by the testator each of them shall have individually the right of returning those properties to their owners. There is, in such matters, no need of consulting the other. But, if the properties placed as trust or loan are not specific, in such a case, there shall be the need for consultation; and hence the condition of the unanimity of action of both the executors.
10. If the testator has embezzled someone's property, each executor may individually return that specific property to its owner.

Same shall be the rule regarding the property purchased under irregular sale (*bay' fāsīd*).

11. If the testator is a co-sharer with someone in a property that is *Mawzun* (capable of being weighed) and *Makili* (capable of being measured) and so is dealt with in weight and measure, each executor shall have the right, without the consultation of the other, to become a co-sharer in the property and get the testator's estate separated. But in the matter of the property which is not *Mithli*, (of the same species) acting individually shall not be valid.
12. Each executor individually has the right of making utilization of the property of the deceased that may soon get spoiled, because the retention of such property generally results in loss.
13. The properties under legacy of the testator that are in different hands each executor, in collecting them together, shall be entitled individually as there is a risk, in not acting so, that the properties wherever and in possession of whomsoever they may be, would unprofitably and invalidly continue in their possession.³⁸

The principle is that when the testator lays down condition in his Will for joint utilization, in cases where there is no need of advice and consultation with each other or when there is the risk of the properties getting wasted or deteriorated, no regard shall be had of the condition laid down by the testator and each executor individually shall be entitled to make the utilization, because dire necessity permits exception. It is essential to act in accordance with the condition laid down only when it is beneficial to and in the interest of the children and the properties and strict observance of the conditions be possible.

Maliki Practice :

According to Maliki jurists if two persons are appointed as executors, whether under two or one instrument, or whether by several or one statement, in all circumstances making utilization individually by any one of these executors shall not be valid except where the one executor makes the other executor his representative. This shall happen when at the time of appointing the executors no direction regarding their capacities to act has been given. (If such direction has been made it is bound to be followed). If one of the two executors dies the Court is entitled to appoint another person

³⁸*Fatawa 'Alamgiri*, op. cit., vol. iv, p. 248; *Damad Afandi* ; op. cit., vol. ii, p. 722.

as the executor in place of the deceased one or appoint the one living if he consents, as the sole executor. In case the two executors differ on some matter, the matter shall be referred to a Court and its direction be obtained. It shall not be valid for any one of the two executors, either in the state of sound health or ill health, to appoint on their own a third person as executor; neither can any one of them alone distribute the property among the legatees if there are several of them; rather they shall have to act essentially in union.³⁹

Shafi'i View :

According to the Shafi'is, when two executors are appointed and it is specified that both of them, jointly or severally, may make the utilization, in such a case, these executors jointly or severally may make the utilization. If, however, the right of making utilization is joint, no executor can make utilization individually. If one out of the two executors dies, the other living executor may, however, make the utilization individually. It is not valid for a dying executor to appoint in his place a third person as an executor. Likewise, if out of the two executors one, due to some reason, becomes incapable or corrupt, the Court, in such an event, should have the power of appointing some other person as executor in place of the incapacitated, corrupt or incapable executor. If both the executors are dead, the Court has the authority of appointing either two or one executor, as it deems proper.⁴⁰

Hanbali Ruling :

The testator, in the event of appointing two executors, specifies their making utilisation both jointly as well as severally, according to Hanbalis, the rules are generally the same as those of the Hanafis and the Shafi'is. According to Hanbalis, however, in such a case, it is not necessary for one executor to appoint the other executor as his representative in the matter of utilization. Rather each of the executors shall have the individual right on behalf of the testator to make the utilization.

Likewise the Hanbalis, in the event of one of the two executors dying or proving incapable, are in agreement with the Shafi'is. But they differ with them in a case where the testator gives to each of the executors the individual right of making utilization and if one of them dies or becomes incapable or incompetent, the acts performed by the one executor shall be upheld. According to Hanbalis there shall be no need of appointing another executor and the one who survives shall be fully competent.⁴¹

³⁹Al-Ābi : op. cit., vol. ii, p. 326.

⁴⁰Al-Firozabadi : op. cit., vol. i, p. 470.

⁴¹Al-Maqdisi : op. cit., vol. iii, pp. 77-79.

Shi'ah Practice :

According to Shi'ah jurists when two persons are appointed as executors in the absolute, or there is the condition of jointly acting by both, the individual utilization by each of the executors shall not be valid. If it is so done the individual utilization by any one of the executors shall not take effect except when the utilization is concerning the maintenance and other necessities of the life of the children of the testator. It shall be incumbent upon the Official (the Qāḍī) to compell both of them to make the utilization jointly. If the Official finds that their acting jointly in making the utilization is difficult, it shall be valid for the Official to remove them. If one of the two executors becomes ill or incapable it shall be valid for the Official to appoint someone else as his assistant. If one of the two dies or becomes corrupt, the existing executor shall be authorised to make the utilization. There shall be no need for appointing another one, because the representative of this other one shall be the Official himself. This last view is not, however, final.⁴²

Section 266. An absolute executor shall have the right of appointing, prior to his death, another person as executor of the testator's legacy, provided the testator has given him such power.

COMMENTARY

There is a difference of opinion among the several schools of *fiqh* on the point whether or not the executor can, prior to his death, appoint another person as executor of the testator's legacy.

Hanafi Rule :

According to Hanafi *fiqh*, the executor, on behalf of the deceased, shall be entitled to make all the utilizations and shall continue to be so empowered as long as he is legally fit for the office of executorship. If he dies and makes no Will in favour of anyone to act as his substitute, the Court shall then have the power of appointing, on its own, an executor in his place. If the executor does appoint another to be the executor after him, this executor so appointed shall be empowered to make utilization of both the legacies. That is to say, he shall be entitled to make utilizations in the legacies of the testator as well as the testator's executor. According to Hanafis, this applies only in cases, where an executor appoints another person as executor and either says, "I appoint you my executor" or says,

⁴²Al-Hilli : op. cit., pt. ii, p. 264.

"I appoint you executor for both the legacies" or says, "I appoint you the executor for the legacy of my testator" or says "I appoint you executor for my legacy". If the appointment of the executor is ambiguous, as is the case in the first expression, or the second expression is used that the appointment is for both the legacies, then in both the cases the appointed executor shall have the power of making utilizations in both the legacies. There is no disagreement amongst the Hanafis on this point. There is consensus of Hanafi Imams on this point as well that if the testator's legacy is particularised, the particularisation shall be authentic. If, however, it is said, "I appoint you executor of my legacy", in this case as well, according to Imam Abu Hanifah, he shall become the executor of both the legacies. This is so his power over the property of another as its executor as is his own legacy in favour of his appointee. The two legacies, therefore, are similarly within his power in his capacity of executor. But Imam Abu Yusuf and Imam Muhammad have said that he shall be the executor of the personal property of only the first (original) executor. Their views are, however, more in consonance with the wordings of appointment or direction of the original executor to the second executor of utilizations in the property of the executor. The property of the original testator cannot be held to be a legacy for this second executor allowing its utilizations by him over which the executor appointed by the testator had the right and which ended with his death.⁴³

Maliki View :

According to Māliki jurists, an executor cannot appoint another person as executor. Indeed if there are two executors they, among themselves, may appoint one another as the operating executor but they cannot appoint some other person as their executor.⁴⁴

Shafi'i Practice :

According to Imam Shafi'i as well, an executor has no right to appoint some other person as executor of the testator's property. According to him the executor is merely permitted to himself make utilizations. He is just a representative. The executor, therefore, shall not have the authority of appointing another person as the executor. Indeed, if the testator had

⁴³Ibn Abidin: op. cit., vol. v, p. 618; *Fatawa 'Alamgiri*, op. cit., vol. iv, p. 250.

⁴⁴Al Abi : op. cit., vol. ii, p. 326.

stated that he i. e., the executor, after the testator's death had the authority of appointing an executor, in that event, his appointing the executor shall be valid.⁴⁵

Hanbali Practice :

Hanbali jurists, on this question, are in agreement with the Shafi'is.

Shi'ah Rule :

The Shi'ahs are in agreement with Shafi'is, Malikis and Hanbalis on the point that if the testator does not delegate to the executor the authority of appointing another executor, he cannot then so appoint an executor. If, however, he, the testator delegates to him such authority, the appointing of another executor by the original executor shall be valid.⁴⁶

According to this writer the point of view of Imams Abu Yusuf and Muhammad of the Hanafis and that of the Malikis, Shāfi'is, Hanbalis and the Shi'ah Ja'friyyah appears to be correct. Hence the law has been codified in the above Section accordingly.

Section 267. There being no debt payable by or a Will regarding the estate of the deceased being in existence and all the heirs of the deceased being minors, the executor shall have the authority of selling the movables from the legacy and that too even with a nominal loss, provided his acting thus is the proper means of providing the necessities of life to the said orphans and of protecting their property. But the executor shall have no power of selling the immovable property except in the following cases :—

- (1) There is a clear benefit to the orphans, for instance, it is fetching double its normal price.
- (2) There is a debt due on the deceased and there is no way of paying it except by selling the property to the extent of the debt due.

⁴⁵Al-Firozabadi : op. cit., vol. i, p. 471; *Mughni al-Muhtaj*, Cairo, 1295 A.H, vol. iii, p. 76.

⁴⁶Al- Hilli : op. cit. pt. ii, p. 265.

- (3) There is a Will to be put into effect immediately from the legacy and there is no movable property and ready cash out of which the Will may be executed. It shall then be valid to put the Will into effect by selling the immovable property to the extent of executing the Will.
- (4) There is a need of ready cash for the necessities of life for the minors. In that case, it is valid to sell the property on a proper price or even with a nominal loss and provide the orphans with the necessities of life.
- (5) There is such a pressure for payment of taxes, or some other burden on the property that it cannot be met out of the income of the property.
- (6) There is the risk of the property (building, land etc.) getting destroyed or becoming unfit for human habitation or being taken possession of illegally.

If the executor sells the immovable property in violation of above, his act shall be held to be void. Even the permission of such utilization by the minor on attaining his majority shall not be acceptable.

COMMENTARY

The purpose of the appointment of executor is that he, after the death of the testator, must protect his property, take care of his children, save the property from getting destroyed and adopt measures for protecting and improving the property and the interest of the children. For carrying out these purposes it is necessary for the executor that whatever utilizations of the property he makes, they must be based on expediencies and welfare of the children. On this account, it is necessary that executor's utilizations like sales etc. must be maintained. Hence Muslim jurists, in furtherance of this view and having regard to the kind and characteristics of the legacy, have laid down the above rules, as summarised in the Section.

In the sale of immovable property as building, land etc. it shall have to be seen whether its sale is imperative and legally permissible. If it is not legally permissible the executor shall have no power of selling the immovable property in as much as the immovable property by itself is not liable to deteriorate.

Generally, the sale of immovable property should carry two meanings: one is the interest of the minors and the other is the imperative or compelling need for the sale of the property; there being no other way for the executor except the said sale. Hence, the jurists have considered the following to be the valid grounds for the sale of immovable property by the executor :—

- (1) When someone, with some purpose of his own, purchases the property of the minors on double or triple the real price. In this case, there is a clear benefit to the minors. The executor can purchase other properties for them. Hence, his selling the same shall be valid.
- (2) When the debt on the deceased (testator) is so heavy that it cannot be paid up from the cash money, if any, in the legacy or from the consideration money of the movable property it is then valid to sell the immovable property proportionate to the payment of debt.
- (3) When there is an absolute Will in the legacy and there is no movable property or an amount in cash for the Will to be put into effect. ('Absolute Will' means that the quantity of the property under Will, for instance 'one third' or 'one-fourth' is not stated, and the testator makes the Will to the effect that a sum of rupees one thousand from his property be given to certain person). Consequently, when there is no amount in cash, or no movable property is in existence, the executor can sell the immovable property proportionate to the required amount because he, in the circumstances, is bound to execute the Will. As against this, when the Will is regarding immovable property itself, its sale, in the circumstance, is not valid; and the legatee shall be considered as the co-sharer with the heirs.
- (4) When the minors are in need of an amount in cash for their maintenance and there is no amount in cash in the estate or

movable property to sell, the executor, in the circumstance, is compelled and forced to realise the amount in cash from the immovable property that may suffice for the maintenance of the minors.

- (5) When the income from the property under legacy is not sufficient to meet the expenses regarding its taxes etc. and which, in spite of attempts made, are not reduced.
- (6) When there arises the risk of the immovable property getting destroyed or ruined and there appears to be no means of protecting it.
- (7) When the executor apprehends some tyrant and despot taking possession of the children's property illegally and of having no power of recovering it.

It is clear from the study of the above, that the executor may only sell when there exists, in the circumstance, some legal expediency. If the same is not, then its sale by the executor shall be void. Even if, after attaining majority the minor gives his consent to such sale it shall not be valid.^{46a}

Section 268. When there is no debt nor a Will regarding the

Powers of the
executor when no
debt or Will

legacy and the heirs of the deceased are major and present, the executor shall have no right to sell any thing out of the legacy without the permission of the heirs. He shall indeed have the right of demanding dues of the deceased, enforcing his rights and handing over them to the heirs. When the major heirs are absent or untraceable the executor shall have the right of selling the movables and hold in trust the value thereof. He shall have no right of utilization in the immovable property. Likewise, when some heirs are present and some are absent he shall have the right of making the aforesaid utilization in the interest of the absentees. However the utilisation in the immovable property shall be made only for the sake of the payment of debts due.

^{46a}*Fatawa 'Alamgiri*, op. cit., vol. iv, pp. 251-52; Ibn Abidin ; op. cit., vol. v, pp. 660-62.

COMMENTARY

If all the heirs are major and present, the executor shall have no right of selling any property of the deceased without their permission, because they themselves, in the circumstance, have the personal right over the property. If they give permission the executor shall have the right of utilization of the property for which the permission has been given. If no permission has been given the utilization made by him shall be void. The executor's duty, thereafter, shall only be restricted to realize the debts of the deceased due from others and after enforcing other rights of the deceased hand over them to the heirs. It also appears from some statements of the Hanafi jurists that the realization of debts of the deceased and taking possession of other of his claims should also depend on the permission given by the heirs. If they decline, the executor shall not have even that right.

If all the heirs are major and absent, the executor has the right of selling the movable properties and keeping in trust the value thereof. He has no right of utilization of the immovable properties. The appointment of the executor is for the purpose of taking care and protect the estate of the deceased. It can be argued regarding the movable properties that, in view of the risk of their getting destroyed, keeping their value in trust is easy and is by way of affording protection to them. Immovable properties, however, are in themselves safe, in as much as, people in order to protect their wealth generally purchase immovable properties. Hence the executor shall not be authorised to make utilization like the selling of immovable properties. But the jurists have also stated that if a risk is involved in keeping safe even the immovable property, the executor, in that event, shall have the power of making utilization by sale of the property, because this method of saving the property in that event shall be the only alternative (such as the apprehension of acquiring or nationalization by the government).

If some heirs are present and some are not, the observance of rules in respect of the first category shall be as if all the heirs are present and in respect of the second category as if all the heirs are absent.⁴⁷ In the opinion of the present writer reference to a Court in respect of the heirs of the second category shall be preferable.

⁴⁷Ibid.

Maliki Practice :

According to Malikis, if, of the heirs of the testator some are minor and some others are major, the executor's utilization of the estate by its sale shall be valid only when the major heirs are present.⁴⁸

Section 269. When the estate is under a debt or a Will to be

Executor's powers on estate under debt etc. put into execution but there is no amount in cash in the estate and the heirs have neither carried out the Will nor have paid the debt due on the deceased out of their own property it is valid for the executor, in case of the estate being submerged in debt, to pay up the debt by selling the movable and immovable properties of the deceased. If the estate is not submerged in debt but there is no amount in cash in the estate for the payment of debt and for putting the Will in execution, it is valid for the executor to pay up the debt and put the Will in execution by selling the property to the extent of the payment of debt or of putting the Will in execution whether the heirs agree to it or not;

Provided that it is obligatory for the executor to pay up the debt and put the Will in execution firstly from the consideration money of the movables. If the consideration is not sufficient for the payment of the entire debt and putting the Will in execution, the immovables may be sold for the payment of the remainder but it shall not be valid that such sale exceeds the extent of the payment of debt and of putting the Will in execution.

COMMENTARY

If the estate is covered by debt or is under Will and all the heirs of the testator are minors, in that case, it has to be ascertained whether the entire legacy is covered by debt or not. If the entire legacy is covered by debt, the executor has the power of paying up the debt by selling all kinds of movable and immovable properties whether they are sold at their real prices or on a little lower price. There is no difference of opinion among the Hanafi jurists on

⁴⁸Al-Abi : *op. cit.*, vol. ii, p. 326.

this point, because the existence of debt on the estate of the deceased is one of those facts that are the basis of the propriety of legal sale of such estates.

If the debt does not cover the entire estate, the executor, for its payment, shall at first sell the only movable property. If a part of the debt still remains unpaid he shall sell, out of the immovable property, only a part to the extent of the payment of the debt remaining due and not more than that. The permission for the sale of immovable property is with a view to fulfilling the obligation. There is no basis or propriety in more than that.

The same rule that has been made applicable in case of debts, shall apply in case of there being a Will left by the deceased. If there is no amount in cash or movable property in the legacy, immovable property may be sold out to the extent needed for the Will being put in execution. This is permissible only when it is an absolute Will. If it is a restricted Will i. e. the land or the building is restricted to the limit of one-third (and that one-third is held to be the one-third of the entire estate,) the executor shall make over this one-third to the legatee and the legatee shall be deemed to be the co-sharer with the heirs.

Position of grandfather in presence of executor :

It is a general rule that if the grandfather is alive after the death of the father of the minors, the guardianship of his grandsons shall pass to him. In this situation if an executor also has been duly appointed, a question will arise as to the status of the grandfather. On this question there is stated to be a difference of opinion between different schools of law.

Hanafi View :

According to Hanafi *fiqh* the grandfather of the minors shall not have, in the presence of the executor, the right of making those utilizations the power of which rests with the executor. The reason is that the father's executor has the power of selling the movables even in case when the testator's children are not in need, of keeping in deposit the price of the movables after their sale, whether or not there be a debt due on the deceased. When there is a debt due on the deceased or the orphans owe a debt, the executor in that event has the power of selling the immovable property as well. The grandfather, on the other hand, has no power of selling the movable or immovable property for the payment of debts due on the deceased. Here the question arises that if a person has a debt due on the deceased, or the deceased has made a Will regarding some of his properties in favour of a particular

person, what step the creditor or the legatee shall have to take for securing his right when the grandfather is present and there is no executor appointed by the deceased? The answer, according to Imam Abū Hanifah, is that they ought to take their case before the Court (*Qāḍī*), who shall either sell the property himself to the extent of the payment of debt or of putting the Will into effect or order someone else to make the payment of the debt or put the Will into effect after selling the movable or immovable property to the extent of the payment of debt or putting the Will into effect. According to Imam Muhammad, the grandfather shall be the substitute of the father in dealing with all those matters, which the father in his lifetime could have dealt with. Imam Abū Hanifah ranks the executor appointed by the father higher than the grandfather whereas according to Imam Muhammad the rank of the grandfather is higher than that of the executor. Some later jurists have upheld the verdict of Imam Abū Hanifah as final⁴⁹ and this is correct.

Maliki Practice :

The view of Imām Mālik is that a person appoints an executor merely with the words that 'so and so is his executor' or that 'he appoints so and so as his executor'. The executor therefore shall be entitled to make all kinds of utilizations. He shall even be entitled to get the daughters of the testator contracted into marriage. In fact, the executor shall be empowered to contract the virgin and divorced or widowed daughters of the testator in spite of other guardians being present and the executor shall get precedence over all those guardians. It follows from these views that the executor appointed by the deceased has precedence over all other guardians including the grandfather and, therefore, the executor is entitled to making all kinds of utilizations.⁵⁰

Shafi'i Practice :

According to Imam Shafi'i the grandfather has precedence over the executor. In the Shafi'i *fiqh*, however, it is stated that the grandfather has been given precedence over the executor only in the matter of getting the daughters of the deceased contracted into marriage.⁵¹ No opinion is

⁴⁹*Fatawa 'Alamgiri*, op. cit., vol. iv, p. 252; Damad Afandi : op. cit., vol. ii, p. 726; Ibn Abidin : op. cit., vol. v, p. 625.

⁵⁰Al-Sahnūn : op. cit., vol. xv, p. 15.

⁵¹Al-Firozabadi : op. cit., vol. i, p. 470.

available in Shafi'i *fiqh* as regards precedence in property utilizations.

Ja'fariyyah Rule :

According to Shi'ah Ja'fariyyah, in case of the grandfather being present, it is not valid to appoint someother person as executor. The question of precedence, therefore, does not arise in Shi'ah *fiqh*.⁵² Hence, if the testator, in presence of the grandfather, appoints someone else as executor it shall be held to be void.

Section 270. (1) The executor appointed by the mother shall Rights of the executor appointed by the mother be entitled to make utilizations merely in the movable property which is inherited by the minor from his mother's side. Legacy inherited by him from others, whether it is movable or immovable, is or is not burdened with debt, shall not be open to utilizations by the executor so appointed.

(2) The executor shall not be entitled to make utilizations in the estate left by the mother when the father or the true grandfather of the minor is alive or the executor appointed by both of them is present.

(3) Of the above said persons if no one else is present, the executor appointed by the mother shall have the right of making utilizations in the estate left by the mother in the manner that he, after selling the movable properties, keeps the proceeds in trust with himself and supplies therefrom the necessities of life to the minor. But the sale of immovable properties shall not be valid so long as there is the burden of payment of debts on them or a Will is intended to be executed therefrom.

(4) Likewise, the person who is merely responsible for upbringing of the minor has no right of making utilizations of any kind in his property except to the extent of supplying the necessities of life to the minor.

⁵²Al-Hilli : op. cit., pt. ii, p. 265.

COMMENTARY

Hanafi View :

The executor appointed by the mother, compared to the one appointed by the father, has limited powers of utilizations. He has not that degree of freedom of action as has the executor appointed by the father. If the mother dies after appointing an executor on her behalf, the executor shall have the right of making utilizations merely in the movable property that the child as heir inherits from his mother. This direction shall only apply in cases where the father of the child or his executor or the grandfather of the child or his executor is not present. The executor of the mother shall have no right of utilization in any kind of property inherited from her where the father of the child or his executor or the grandfather, if alive, are present.

If the father or grandfather or their executor is not present and the executor of the minor's mother is present and besides the property of minor's mother other properties are possessed by the child, the mother's executor, in such circumstance, shall have the right of utilization in the movable property of the mother; he shall not have that right in such immovable property. Rather, the Court (*Qāḍī*) shall have the right of making utilization in immovable and other properties, either by himself or by appointing an executor for the purpose.

Hence, for the utilization in the properties of the child that he inherits from his mother, it shall have to be seen whether the child's father or the grandfather or their executor is present. If it is so, the mother's executor shall not have the right of making utilization. Indeed, if none of the father, grandfather and executor appointed by the father is present, the mother's executor shall have the right of selling the movable property of the child and of keeping its consideration, the cash money, in trust for the minor. He shall not have the right of selling the immovable property, except when there is some debt due on the mother, or she has made a Will and there is, in the legacy, no cash amount or movable property by the sale of which the debt due can be paid or the Will made is put into effect; in such circumstances the sale of the immovable property to the extent of payment of debt due, or putting the Will into effect, shall be valid. Same is the rule regarding the purchases made for minor's necessities of life. The purchase of only such materials, however, shall be valid on which depends the life and maintenance of the children. The purchase of non-essential

materials shall not be valid. Same is the rule regarding the executor appointed by the brother or uncle and other relatives as against the executor appointed by the father or the grandfather. The difference between the executor by the father and appointed the by mother is, that the father, in his lifetime, has the right of making every kind of utilization in the property of his minor children and his executor, being his deputy too, shall have the right of all utilizations. Whereas the mother, in her life, has no right of utilization in the property of her children. Her executor, too, shall, therefore, have no right of such utilization. If on the death of someone there is neither his executor nor a lawful guardian of his children and some stranger takes the children under his care the stranger shall not have the right of making any utilization in the property of the children. He can only, by selling some of the movable properties, collect necessities for the supply of maintenance and clothes to the orphans.⁵³

Maliki Practice :

According to Imām Mālik as well, if the father of the children with the mother's executor is present, the mother's executor shall have no right of utilization. If the father, however, is not present, the executor shall have the right of utilization merely in the estate left by the mother, and that too when the estate left by the mother is very small. If it is a large one the supervision of the Court shall then be necessary.⁵⁴

Shafi'i Practice :

According to Imām Shafi'i the condition for appointing the executor for the children is that the person who appoints the executor must himself be initially the guardian of the children. As the mother has no lawful, personal and real right of being the guardian of the children from the beginning, rather the right passes to her after others, the executor appointed by her shall not be considered to be an executor at all⁵⁵. The Hanbalis seem to be in agreement with the Shafi'is in this respect.⁵⁶

⁵³ *Fatawa 'Alamgiri* : op. cit., vol. ii, pp. 251-52; Ibn Abidin : op. cit., vol. v, p. 625.

⁵⁴ *Al-Sahṇūn* : op. cit., vol. xv, pp. 16-17; *Al-Abi* : op. cit., vol. ii, p. 325.

⁵⁵ *Mughni al-Muhtāj* : op. cit., vol. iii, p. 76.

⁵⁶ Ibn Qudama al-Maqdisi: *Sharḥ al-Kabīr*, on the margin of *Al-Mughni* Cairo, 1347 A.H., vol. vi, p. 591.

Shi'ah View :

According to Shi'ahs the mother may make a Will regarding her property but she cannot make a Will concerning the custody and supervision of the children.⁵⁷

Section 271. It is valid for the executor to engage in trade with the property of the minor with a view to increase the minor's property or to deal with it in a manner beneficial to the minor. But his dealing with the property of the minor in one's own favour or for self-interest shall not be valid.

COMMENTARY**Hanafi View :**

As expediency is the basis of valid utilization made by the executor, his carrying on trade on behalf of the minor with his property is generally beneficial and safeguarding the interests of the minor. Maintaining the property as it is without making any improvement is not beneficial. Hence it is valid for the executor to engage in trade himself or get it carried through someone, as an agent or as a partner. All utilizations of this kind are beneficial to and in the interest of the minor, and same is the responsibility of the executor that he must perform all acts that are beneficial to and in the interest of the minor. The executor, however, shall not engage in trade either with himself or with other persons belonging to his family. It shall not be valid for the executor to take the minor's property himself as agent and carry on trade and draw benefit for himself. If he does so he shall have to compensate the minor for any loss that results.⁵⁸

Maliki Practice :

According to Imām Mālik the executor may, in the matter of the property of the minor, act in a manner that may prove to be the means of increase in and preservation of the property of the minor. According to him as well the executor's personal interest linked with minor's property is not valid.⁵⁹

⁵⁷Al-Hilli : op. cit., pt. ii, p. 259.

⁵⁸Fatawa 'Alamgiri : op. cit., vol. iv, p. 253; Qāḍī Samawah, *Jami' al-Fusulayn*, Cairo, 1301 A.H., vol. ii, p. 13.

⁵⁹Al-Abi : op. cit., vol. ii, p. 326.

Section 272. (1) It is valid for the executor to sell the movable property of the minor to a person who has no relationship with the executor or with the deceased, provided the sale is on a reasonable price or on a nominally low price. But doing so, in the event of heavy loss, is not valid. Same is the rule regarding the purchase of some property for the minor.

(2) It is not valid for father's executor to sell the property of the minor to a person in whose favour the evidence of the executor is not acceptable, nor it is valid to sell it to any of the heirs of the deceased except when it is beneficial to and in the interest of the minor.

COMMENTARY

Investing of the property of the minor in trade by the executor has been generally held to be valid. If the executor appointed by the testator trades with and deals in the property of the child with a person who is a stranger to both the testator and the executor, and the property is movable, the sale on full price or on a little lower or higher price shall, according to the unanimous opinion of the Hanafi jurists, be valid; because such fluctuation is an incident of business. If the price, however, goes extremely low the sale shall not be valid, because the guardianship of the executor is intended to effect improvement and procure benefit.

If the executor enters into a sale transaction with a person who is not a stranger to him or to the testator, for instance, he sells it to his father or to his son or sells it to the heir of the testator, then according to Imām Abū Ḥanīfah the sale shall be valid when it is profitable and in the interest of the minor. But if it is sold on a price not profitable (i. e. on a price even equal to its value) the sale shall not be valid. Imam Abu Yusuf and Imam Muhammad, however, maintain that sale on a proper price shall also be valid. However, according to all the three Hanafi Imāms, selling even with small discount shall not be valid. This is in respect of movables only.

Rules laid down regarding the sale of the property of the minor shall also apply regarding the purchase of the property for the minors. Thus, if the executor purchases some property from a stranger for the child on

a proper price or on a price a little higher than usual, the purchase shall be valid. But purchase on a much higher price than its value, shall not be valid. This relates to the executor appointed by the testator. It is not valid for the executor appointed by the Court (*Qāḍī*) to sell to such a person whose evidence in favour of the testator is not acceptable. The executor here is the agent of the Official. The same rule shall apply to the agent that applies to the principal and the decision of the principal (Official) shall not be acceptable for a person whose evidence on his behalf is not acceptable. The same rules shall also apply to the purchase made by the executor appointed by the Official for the minor.⁶⁰

Section 273. It is valid for the father's executor to sell his own property to the minor or purchase the property of the minor himself provided the same is beneficial to and in the interest of the minor. Conditions of its being beneficial are as follows :—

Conditions of sale
by father's execu-
tor

- (a) When the immovable property of the minor is purchased on double its price and when executor's property is sold to the minor on two-third of the price.
- (b) When the dealing is in respect of movable property with a margin of one-third of its price provided the deal is manifestly beneficial to and in the interest of the minor. For an official executor, however, purchasing for self or selling one's property in favour of the minor is not permitted.

COMMENTARY

If an executor sells some thing out of the property of the orphan in his own favour, the sale is valid provided it is beneficial to and in the interest of the minor. If the property is immovable, the double of its price shall be considered to be beneficial. If it is movable property the increase by one-third of its price shall be considered to be beneficial ; the sale at a lesser rate shall not be valid.

⁶⁰Ibn Abidin : op. cit., vol. v, pp 620-22.

If the executor is appointed by the *Qādi*, he shall not have power to purchase or sell the immovable property to himself. The executor appointed by the Court acts under the delegated authority. Since the Official himself has not got the right to act in that manner, his representative (executor appointed by him) as well shall have no such authority.⁶¹

Section 274. It is valid for the executor to enter into a contract of sale with a stranger on the consideration money being made payable after a fixed period, provided the period fixed for the payment is not too long and there is no risk of the consideration money not being realised from the purchaser on the expiry of the period.

COMMENTARY

The validity of sale by the executor, being dealt with above, there remains the question whether the executor has also the right of selling some property of the minor on credit. In this respect, the Hanafi rule is that if the executor sells on credit some property of the minor to a stranger considering it to be beneficial to the minor, provided the period for the payment of the consideration money is not too long and there is no risk of its non-payment, the sale shall be valid. Because in the matter of sale and purchase it is not possible to escape from dealings in cash and on credit. Indeed, care shall have to be taken that the transaction should not become the cause of any unjust risk to the minor. That is why condition (1) of the period being short and (2) there being no risk regarding the non-payment of consideration money have been attached to such transaction.⁶²

Shafi'i practice :

No clear assertion regarding the payment of sale on deferred payment as above could be found in the books of Shafi'i *fiqh* under study but, on principle, according to Shafi'is the aforesaid utilizations which are not harmful to the minors but are the means of benefit to them shall be valid.⁶³

⁶¹Ibid.

⁶²*Fatawa 'Alamgiri* : op. cit., vol. iv, p. 252.

⁶³Al-Firozabadi : op. cit., vol. i, pp. 335-36.

Section 275. It is not valid for the executor to pay up his own debt from the minor's assets or borrow from the property of the minor, or give loan to others therefrom, or mortgage his own property to the minor, or himself take in mortgage the property of the minor. But it is valid that he mortgages the property of the minor if there is a debt of a stranger due against the minor or on the deceased or if the property of the minor is covered by a debt. He may then mortgage a property in lieu thereof or himself accept surety for the same.

COMMENTARY

Hanafi Practice :

It is not valid for the executor to pay his personal debt from the property of the minor. If he does so he shall be responsible for that property. Likewise it is not valid to give the property of the minor as loan to someone else.

If the executor (by chance) advances loan, inspite of prohibition, out of the property of the minor the jurists have not held this act to be a cause for his dismissal. That is to say, he shall not stand dismissed from his office of executorship. The reason is that the loan must have been advanced to the extremely needy individual. The Shari'ah has, at innumerable places, emphasised the virtue of helping others to meet the requirements of the needy and of those who are in dire want and has, for the same, promised great reward and recompense in the Hereafter. Hence, the jurists have not held the advancing of chance loan by the executor to be a cause for his dismissal. Indeed he shall be held to be a surety for that property to the orphan.

As against this, such utilization of this kind by the official (Qādi) shall be valid in as much as he has complete control over the recovery of the property. There, however, shall not be given even to the Qādi an unlimited freedom of dealing with a minor's property.

The rule that has been laid down governing the executor's advancing loan from the property of the minor shall equally apply to his borrowing for the minor. As the advancing of loan is not valid so also is the borrowing without necessity not valid. If the executor borrows for the child, the executor himself shall be held surety for the property. Imām Muhammad has, however, stated that if the executor has control over the payment of the loan there is no harm in his borrowing for the minor.

If there is a debt of the minor outstanding against the executor, for instance, the executor makes some purchases for himself from the property of the minor and the minor is benefitted with that purchase, or due to waste in the property of the minor the executor becomes liable for it, it shall not be valid for the executor that instead of paying up the debt or reimbursing that waste, he, the executor mortgages some of his personal property to the minor which will amount to placing the property in his own possession. If it is so done and the property mortgaged goes waste, the debt of the minor shall remain unpaid and so payable by the executor, and the demand of the same shall be duly made from him.

Likewise, if there is a debt of the executor due against the minor, (for instance, the executor sells some of his own property to the orphan and does not realise its price from him, or purchases some property for the minor from someone else and pays its price from his personal property and does not realise it back from the property of the minor) the executor shall not have the right of keeping some property of the minor as mortgage with himself in lieu of the debt. However, the father of the child shall be an exception to this rule. Both the acts are valid for the father i. e. he can place the property of his child in mortgage to himself and place his property in mortgage with his child. The jurists have explained this difference by arguing that the same person cannot act in the matter of mortgage as a *Mutawalli* for both the mortgagor and the mortgagee. That is to say, it is not valid for one person to be both the mortgagor and the mortgagee. The jurist, however, have exempted the case of a father and have held his one personality to be two personalities and his one speech to be two speeches (*ijāb* and *qubūl* both). The reason for this is the extreme love of the father for his child. As against this, the executor has a less consideration for the welfare of the minor compared to that of the father.

If the executor carries on trade with others on minor's behalf with the latter's property and in the trade a debt becomes due on the minor, or the executor purchases some property for the requirements of the minor and does not pay its price, in the circumstances, the debt shall be due with the minor and it shall be valid for the executor to mortgage some property of the minor with the creditor. Such transactions are generally carried on with the intention of making profit for the minor. Due to this reason, such right is given to the executor. In trade, chances of loss and of give and take and the requirements of taking on mortgage and

giving in mortgage do arise. Hence, if the executor purchases something for the minor's food and clothing on credit and in payment of its price mortgages some of the properties it shall be valid, because acting thus for meeting out the minor's needs is valid. Placing property in mortgage is, in fact, the discharging of obligations to others, which is legally valid, but is also commendable.

As the executor may, in payment of the debt of the minor, put the property of the minor in mortgage, he, likewise, may take the property of others in mortgage with himself for recovering the debt of the minor. The ultimate purpose of each of the two stated cases is to earn profits to the minor for which the executor is fully competent.⁶⁴

Shafi'i Rule of Conduct :

According to Shafi'i, if the utilization by way of mortgaging or advancing loan of the minor's property is beneficial to and in the interest of the minor it shall be valid, otherwise it shall not be valid.⁶⁵

Section 276. It is valid for the executor to appoint for utilizations, within his powers, an attorney on his own behalf. Such appointment shall stand terminated on the death of the executor or the minor.

Attorney of the
Executor

COMMENTARY

As the executor has the right of making utilizations in the property of the minor it is also valid for him to either make the utilization himself or appoint, for the performance of those affairs, someone else as his attorney. Attorney shall be a person appointed as representative in the rightful utilization by a person who himself is entitled to make that utilization. Hence, the attorney in the capacity of a representative of his principal shall perform those affairs that are entrusted to him. The attorney automatically stands removed on the death of the principal. He shall, likewise, stand removed on the death of the minor in as much as the attorney derives restricted power to the property of the minor.⁶⁶

⁶⁴Qāḍī Samawah : op. cit., vol. ii, p. 14; *Fatawa 'Alamgiri* : op. cit., vol. iv, p. 253.

⁶⁵Al-Firozabadi : op. cit., vol. i, pp. 335-36.

⁶⁶Qāḍī Samawah : op. cit., vol. ii, p. 20; *Fatawa 'Alamgiri* : op. cit., vol. iv, p. 254.

species and value. If the species is the same but the value is less e.g. Rs. 900/- for a loan of Rs. 600/- the compromise shall be invalid. If, however, the species is different, the value may be more or equal or lesser. In the first two events the compromise shall be valid, not in the third case if the loss is greater than in that natural to every day transactions. If there is no implicit proof or evidence to establish the debt of the deceased, in such an event, it is quite valid for the executor to arrive at a compromise. No regard shall be paid to its being beneficial or otherwise. Because in such a case it is in the interest of the minor. If it is not done so there is the greater risk of the entire debt being lost to the minor.

The executor shall not have the right of condoning some part of the debt of the deceased due from someone, or of giving acquittance from it or of fixing a period for its payment, when the terms granted by the deceased himself do not so imply. If however the debt has become due on someone by the act of the executor himself, then according to Abu Hanifah and Muhammad Al-Shaybani, the above referred actions of the executor shall be valid. The executor shall nevertheless stand surety in the interest of the minor and shall indemnify the minor against any consequential loss. According to Abu Yusuf, however, the executor shall not be so liable.

The said cases refer to the debts of the testator or of the minor that are due on someone else. But the cases where the debts are due from the deceased (testator) or on the minor and the creditor claim from the executor his debt or value of the thing damaged and if the claim lacks proof it shall not be valid for the executor to compromise the claim, as there would be loss to the minor in that compromise. If the claim of the claimant is a proved one, in that case it is valid to enter into a reasonable compromise.

If the executor acknowledges about a certain thing that it does not belong to the testator; rather the thing belongs to someone else, be that it is cash of whatever amount or a thing movable or immovable the acknowledgement shall not be valid.⁷⁰

Section 278. It the executor pays the debt of the deceased regarding which the claimant has no evidence nor is there regarding it any decision of a Court,

Liability of the
executor

⁷⁰ *Fatawa 'Alamgiri* : op. cit., vol. iv, p. 254; *Qāḍī Samawah* : op. cit., vol. ii, p. 17.

neither the executor has any evidence in proof of that debt nor the heirs confirm it, rather they express on oath their unawareness of it, then the executor shall be responsible to reimburse the estate for the sum paid out of it by him.

COMMENTARY

If a person on the death of the testator makes a claim of his debt against him, the executor, on proof of it, shall have the right of paying up the debt from the property of the deceased and he shall not be held responsible for whatever he pays out provided the debt stands proved by evidence, or a regular decision on debt has been given in his life-time against the testator but he dies before the payment of the debt, or the heirs of the deceased admit the claim of the claimant.

If the debt is not proved by a legal method but the executor has personal knowledge of it, for instance, there is the testator's own admission made before the executor that there is a debt of certain person in so much amount due from him, or the executor has seen the testator damaging the property of some person and is dead before paying its compensation, in such circumstances, according to some jurists, the executor may pay up the debt whereas, according to some other jurists, he cannot so pay up the debt.⁷¹

Section 279. The executor is entitled, provided he so demands, to get remuneration for his office of executorship and for services rendered by him and payment may be made to the extent of actual services.

COMMENTARY

The executor is the care-taker of the minor children of the deceased. He has to take care of the affairs concerning the maintenance of the children, which continues till the minors attain the age of discretion. Hence, if no remuneration for the services rendered by the executor is allowed, it is quite possible that he may not be interested in carrying out his duties properly. According to the jurists in general, therefore, his accepting remuneration shall be valid. Indeed, if the executor is himself a needy person his taking remuneration for the services rendered by him,

⁷¹*Fatawa 'Alamgiri* : op. cit., vol. iv, p. 255; *Qāḍī Samawah* : op. cit., vol. ii, pp. 17, 24, 26-27; *Ibn Abidin* : op. cit. vol. ii, p. 629.

is unanimously held valid. If the executor is not a needy person then according to a group of jurists his taking remuneration shall not be valid as it is so stated in the Qur'an. (iv : 6). The other group says that in both the situations he may take such remuneration, because no service for the children can without remuneration be forcibly demanded from him, as he acts in the capacity of a benefactor to the children. So far as an estimate of remuneration is concerned it shall depend on the specific character of the services rendered.⁷²

Section 280. The minor children of the testator shall after
 Rendition of attaining their majority, have the right of
 Accounts demanding from the executor a rendition of
 accounts of the expenditure incurred by the executor.

COMMENTARY

The property of the minors remains in the custody of the executor for the purpose of maintaining the children by spending from it on their needs in accordance with their requirements and he must continue this till they reach majority and attain sufficient maturity for proper management of the properties. When the children reach that stage it shall be obligatory upon the executor to hand over the remaining property to them and he shall give to them a complete and detailed account of whatever he has spent on them during their minority.⁷³

Section 281. If prior to accounting the executor dies, the
 Nature of execu- minors shall have no right of demanding
 tor's liability accounts from the heirs of the executor, except
 where the executor has in his lifetime given details of the
 orphan's properties and at the time of death of the executor
 such properties exist, and those properties or a part of them is
 wasted after the death of the executor.

COMMENTARY

The principle is that if the executor dies before recording the details of the property of orphan minors, its damages shall not be taken from the estate of the executor. If he, in his life, records its details and the stated property

⁷²Ibid.

⁷³Ibn Abidin : op. cit., vol. v, p. 634.

exists, the minor shall become its owner. If it does not, the minor shall be entitled to get reimbursed from the estate of the executor. If the executor dies prior to any accounting but he records the details of the properties (that so much of it is in cash and such properties in such form do exist) the orphans shall be the owner of all of them. If any of the properties so detailed does not exist the orphan shall be entitled to get it reimbursed from the estate left by him (the executor). If the executor does not record the details of those properties of the minor that patently do exist and are ascertained that shall become the property of the orphans, but those that cannot be ascertained as the estate of the deceased, the executor shall not be accountable for their return or reimbursement.

Here the question arises that as the executor, according to *fuqha*, has the status of a trustee and as such the trustee stands accountable for the property deposited in trust with him. For instance, a person keeps some property of his in deposit with another. The person with whom it is deposited dies and makes statement regarding the deposit, but it is found included in his estate; or some person takes on rent or borrows some thing from another person and dies without making any statement regarding it and the property taken on rent or borrowed is not found included in his estate, the price of the property taken on rent or borrowed shall be paid to the owners of the property from the estate. But, in case of an executor, if he dies without recording the details, it has been held above that the thing not ascertained as included in the estate of the legator why it shall not be taken from the legacy of the executor? The answer is that the executor is undoubtedly a trustee but there is a difference between an executor and a trustee. The executor is such a trustee who has the right of making all such utilization in the property of the orphan (minor) that are beneficial to him. On this basis the executor has been given such legal privileges that a mere trustee does not enjoy. As against this the person with whom deposits are kept or who has taken on rent or borrowed a thing, does not have the right of making any kind of utilizations.⁷⁴

⁷⁴Zayd al-Abyani: *Aḥkām al-Shari'yyah fil Aḥwāl al-Shakhsiyyah*, Cairo, 1920 A.D., vol. ii, p. 194.

CHAPTER XXXIII

LAW OF INHERITANCE

Definition, Conditions & Grounds of Inheritance

Section 282. Inheritance is an involuntary devolution of property through which the estate of a deceased person gets transferred to the heirs as his or her successors.

Definition of
Inheritance

COMMENTARY

Distribution of wealth is a *sine qua non* for advancement of society, culture and civilisation. Transfer of property under Islamic Shari'at is of two kinds : one is voluntary and the other is involuntary.

Transfer of property that takes place voluntarily is either without consideration or for consideration. Transfer of property without consideration in normal health is called *hiba* (Gift), whereas in cases of transfer after death or in sickness the law applicable to 'Will' is attracted. A clear expression of one's intention of transference of the corpus of property or its usufructs with reference to the period after death is called "Will". Transfer of property with consideration in all its forms is "Sale" or a "Covenant" of the like nature.

The other form of transfer of property which is involuntary is the automatic transfer of property from a deceased person to his or her heirs wherein it has no connection with any Will, intention or authority of the deceased. This involuntary transference of property is called "Inheritance". In other words, the devolution of one's property on death in favour of another as a successor is called "Inheritance".¹

The basic difference between the said two modes of transfer of property is that in the voluntary mode of transfer of property between the transferor and the transferee proposal and acceptance and in some cases as in Waqf merely a proposal is a necessary condition, whereas the

¹Abdullah b. Mahmūd b. Mawdūd (d. 683 A.H.): *Al-Ikhtiyar li'ta'lil al-Mukhtar*, Matba' Mustafa al-Babi, Cairo, 1370 A.H., 1951 A.D., vol. v, p. 85, *Kitāb al-Fara'id* :

“انتقال مال الغير الى الغير على سبيل الخلافة”

involuntary mode of passing ownership in property i. e., inheritance is independent of either of proposal or acceptance.

Moroccan Law :

Inheritance in Moroccan Law, "Qanun al-Aḥwāl al-Shakhsīyah" under Section 217, has been defined in these words: "Inheritance is the process by which, on the death of the owner, the right of ownership to his property gets transferred, without any favour or consideration to the entitled ones."

Section 283. There are three constituents of inheritance, namely, (i) the deceased ; (ii) the heir; and (iii) the estate of the deceased.

Constituents of
Inheritance

COMMENTARY

(i) **Ancestor's death**—The first constituent of inheritance is the owner-deceased. The right to inheritance is created only when the owner's actual death or assumed death by law has taken place.

Actual death—is the one in which the relationship with real life has in fact snapped. That is to say, the soul has with certainty departed from his body, or life is actually extinct.

Assumed death—is the one wherein presuming the deceased as alive his actual death is assumed to have occurred thereafter. For instance, the child from the womb of his mother is removed offensively and separated from the body of the mother, and is actually dead.

Death by Law—is the case where the relationship with the real life is held to have snapped under presumption of law. For instance, a court passes a verdict of death against a person of unknown whereabouts or an apostate is held to be dead from the time of his turning an apostate.

Modern Legislation :

Egyptian Law—*Qanun al-Aḥwal al-Shakhsīyyah* : After the ancestor's actual death or death under a decree, the right to inheritance shall be created provided the heir is alive at the time of death of the ancestor or a decree from the court to that effect has been obtained. (Section 1).

Moroccan Law—*Mudawwanatul Aḥwāl al-Shakhsīyyah* : Right to inheritance is created after the actual death or a decree to that effect of the ancestor and on proof of the heir's being alive at that time. (Section 218).

Death under decree is that where it is unknown whether a person is alive or dead, and the Court, because of these circumstances, passes a decree declaring him dead i. e. holds him to be dead. (Section 219).

(ii) Heir :

The second constituent of inheritance is the heir (*wārith*). The word *wārith* is derived from the word '*irth*'. The literal meaning of the word '*irth*' is "remainder". The Prophet (*Sallallahu 'alayhi wa Sallam*) has said you have inherited that faith which your father Prophet Abraham has left behind him."^{1a} The heir is called heir (*wārith*), because he remains alive after the death of his ancestor. As if he is a 'remainder' of the family of the ancestor and owns as a successor of the ancestor in respect of the ancestral property.²

With the death of the ancestor the ascertainment of the life of the heir is essential, whether he is actually alive or is assumed to be alive, for instance, the child in the womb of the mother. The share, therefore, of the child in the womb, assuming him to be alive, shall be kept aside. After the child is born alive, the estate shall be held to be his property. Indeed, in circumstances, where on the death of the ancestor, the heir being alive not being known, there shall be no succession between them, as in the cases of those who die by drowning together, by getting burnt together or by getting crushed together under a fallen building etc. This relates to cases when the ancestor and the heir both die together and it is not known who died first.

Modern Legislation :

Egyptian Law—Qanun al-Ahwal al-Shakhsiyyah : For being entitled to inheritance it is essential for the heir to be alive at the time of the ancestor's actual death or death under decree. The child in the womb shall be entitled to inheritance when there is in him present the conditions stated in Section 43 of this Law. (Section 2).

Syrian Law—Qanun al-Ahwāl al-Shakhsiyyah : It is a condition for being entitled to inheritance that the heir be alive at the time of the death of the ancestor or at the time of the decree of death passed against the ancestor by the Court. The child in the womb shall be entitled to inheritance when the conditions stated in Section 236 of this law are fulfilled. (Section 260 (2)).

انكم على ارث من ارث ابيكم ابراهيم^{1a}

²Ibid :

”والارث في اللغة البقاء“ وسمى الوارث لبقائه بعد المورث“

(iii) Estate :

The third factor in the law of inheritance is the estate (subject of inheritance left by the deceased) which is called *tarka* : The word "*Tarka*," is derived from the word "*Tark*" and is in the meaning of "*Matruk*" which literally means "property left".

"*Tarka*" technically, in the Law of Inheritance, is that property which the deceased (ancestor) leaves behind him as his lawful property, "*Tarka*" in *Baḥr al-Rā'iq* has been defined thus; "*Tarka*" means that property which the deceased leaves behind him and there is no right of another particular person attached with that property.³ It means that a property with which the right of some other person is attached shall not form part of the estate of the deceased until the liability on that property is paid off.

Thus, the estate in inheritance is that property which a person on his death leaves behind him and the same is his lawful property though it may not have come under his possession. Hence, if a warrior (*Mujahid*) dies in the course of a religious war (*Jihād*) prior to the distribution of the spoil, his share in the spoil shall be considered as his property which shall be divisible among his heirs, provided the spoil has reached Dar al-Salam. Likewise, the property that gets included in the property of the deceased after his death but the basis of such inclusion has come into existence in his lifetime, that property as well shall be considered as included in his estate. For instance, a person dies after laying trap. After his death a prey is caught in the trap. The prey shall be included in his estate,⁴ or a person applies for the purchase of some shares of a company and dies, the shares are allotted to him after his death; the shares in the circumstance shall be considered to be his estate.

Some other forms relating to estate (*Tarka*) :

- (1) The property which in the eye of *Shari'ah* is not reckoned or declared as property, shall not be included in the estate of the deceased.
- (2) A property which the deceased has usurped or stolen or acquired through dishonest means such as bribe, shall not be included in

³Ibn Nujaym, Zaynuddin Ahmad b. Ibrahim (d. 970 A.H.) : *Al-Baḥr al-Rā'iq*, Dar al-Kutub al-Kubra, Cairo, 1334 A.H., vol. viii, p. 489 :

”المراد من التركة ما تركه الميت خالياً - من تعلق حق الغير بعيثه“.

⁴Yusuf Musa, Dr : *Al-Tarkah wal Mirāṭh*, Dar al-Kutub al-Arabi, Cairo, 1960, p. 72.

the estate of the deceased as the *Shari'ah* does not regard it as the rightful property of the deceased. If the heirs distributed such property among themselves they shall be committing a sin. As the deceased is liable to God for acquiring the said property illegally and for leaving the same behind him, the heirs will also be held liable to God for distributing the said property among themselves and not returning the same to its real owners, if known (or not giving it in charity, if the real owners are not ascertainable).

- (3) If a property of the deceased is mortgaged with someone else and the deceased did not leave behind so much other property that by making payment therefrom the property mortgaged be redeemed. In that case, the property mortgaged shall not be included in the estate of the deceased. Indeed, if on being sold out that property by the mortgagee, if there is left out any amount, the same shall be included in the estate of the deceased.
- (4) The pension of the deceased which, during his lifetime, had accrued against the government or other institution shall be included in the estate left by him. Maulana Mufti Muhammad Sābir has stated in his book *Mishkat al-Siraj* (Maktaba Thanwi, Karachi), that the pension, not being a right of the deceased but a reward, will not be deemed as the estate of the deceased. According to this writer, the position of pension is not so. The pension is, in fact, an additional benefit under the terms of service which is held to be a right of the employee on completion of a certain period of service under the service rules. That is why, it becomes a right justiciable. No employee can be deprived of it without a valid cause as laid down under the terms of service. The Privy Council, during the British rule over India, in the case of *High Commissioner of India vs. M. I. Lal* (PLD 1948 P. C. 150) held even the salary of a government servant to be a bounty, which was followed by the Pakistan Federal Court in *Merajuddin case* (P. L. D. 1959 F. C.) but this decision was overruled by the Pakistan Supreme Court in the case of *A. W. Issac* (P. L. D. 1970 S. C. 415) and held the salary of a government servant to be his right. On this analogy, it can be argued that besides pension, the amount of gratuity is also a right of the employee who becomes entitled to receive it on successful completion of his service as laid down in service rules. The difference between the right of 'salary' and 'pension or gratuity' is merely that the right of salary is an existing right

whereas the right of pension and gratuity is a contingent, deferred and conditional right which, on arising out of the contingency or fulfilment of the condition comes into existence and becomes enforceable in law against the employer.

- (5) Any employee who, during his lifetime, files his nomination with his employer, in favour of his heir or non-heir, nominating him to receive the amount of pension or gratuity, will that nomination be regarded as a 'Will' in favour of the person nominated? The answer is that if the nomination fulfils all the requisites of Will, it shall be deemed to be a Will to the extent of the deceased. If the nomination simply indicates an authority to receive the amount, in that case, the amount so received shall belong to all the heirs according to the law of inheritance. The same rule shall also apply to provident fund of the deceased. In case of insurance, however, the position is different, because firstly, the insurance, in the eye of *Shari'ah*, is illegal as it falls within the ambit of gaming (*Qimār*). Thus, according to *Shari'ah*, the amount received on the insurance policy will not be included in the estate of the deceased. The amount actually paid to the insurance company by the deceased will, however, be included in the estate of the deceased. If the heirs of the deceased distribute among themselves the over and above the amount actually paid they shall be answerable for their act before God. If the deceased has appointed someone as his nominee to receive the insured amount from the company, it shall be governed by the law of the land. So far as the application of *Shari'ah* law is concerned the insurance itself being illegal, the amount received thereunder except the deceased's own money, shall not be the estate of the deceased according to *Shari'ah*.
- (6) If a person dies, during the course of his employment, his heirs are paid a compensation by his employer or a person dies of an accident during his journey by rail or air due to negligence of the air company or the railways, his heirs are compensated under law of the land, or an innocent person is killed in riot the government pays some compensation to the heirs, or a person is killed on account of rash and negligent driving of a motor vehicle the owner is required to pay damages to the legal representatives of the deceased. In all these cases the amount received by the heirs may not be regarded as the estate of the deceased, in its strict sense, in the eye of *Shari'ah*, yet it is distributable among the heirs of the deceased in pursuance of the law of *Diyat* in Islam.

Some more Definitions of estate of the deceased:

Hanafi School : Estate of the deceased, according to the Hanafis, is interpreted to mean that property of the deceased over which there is no right of a stranger. Hence, the property over which there exists a right of stranger, for instance, mortgage etc. shall not be included in the estate until the mortgage money is paid or it has been realised from the property itself.

Maliki School : According to Malikis as well, the right of some other person in the estate of the deceased attached to the property itself shall be considered as having excluded the said property from the definition of the estate.⁵

Shafi'i School : According to Shafi'i jurists, every thing that belongs to man in his life and what he leaves behind after his death whether it be the properties or rights shall be called his estate. Indeed from the writings of the author of *Mughni al-Muhtaj* it is clear that according to the Shafi'is as well, if a stranger's right is attached with the estate, for instance, it is under mortgage, that property shall not be termed as estate of the deceased till the stranger's right does not lapse or is not paid up.⁶

Hanbali School : Same is the case with Hanbali jurists. According to them as well the estate is that property or proprietary right which the deceased leaves behind after him. That is why it is called *wirṭha*.⁷

Zahiri View : The views of Imam Ibn Hazm of the Zahiri sect are in accord with that of the Hanafis.⁸

Shi'ah : According to the Shia'h jurists the property left by the deceased should be considered to be his estate, but if it is submerged under debt, it shall be the property of the ancestor merely in law. Being submerged under debt it shall not devolve upon the heirs. If it is not so submerged, it shall be divided among the heirs, after payment of debts.⁹

⁵Al-Abi, Abdul Sami' : *Jawahar al-Aklil*, Matba' Mustafa Al-Babi, Cairo, 1366 A.H., vol. ii, p. 327.

⁶Al-Sharbini, Muhammad al-Khatib : *Mughni al-Muhtāj*, Matba' Mustafa al-Babi, Cairo, 1377 A.H., vol. iii, p. 2.

⁷Yusuf Musa, op. cit., p. 72.

⁸Ibn Hazm, Abu Muhammad (d. 456 A.H.) : *Al-Muḥallā*, Matba' al-Imam, Cairo, vol. vi, p. 309.

⁹Al-Hilli, Najamuddin (d. 474 A.H.) : Beirut, pt. iv, p. 183.

Analysis :

The definitions of *Tarka*, as stated above, represents on the whole two points of view : One is that "the estate of the deceased is constituted of "properties" and the second is that "properties and rights" both are included in the estate of the deceased. The Mālikis, Shāfi'is and Hanbalis have included both properties and rights (except *right in personam* such as right of guardianship) in the definition of legacy and in support of their practice they rely on the Prophet's tradition, "One who leaves a property or a right behind him, it is for his heirs".¹⁰ But the Hanafis maintain that the word 'right' in this tradition has not come down to them and thus it cannot be the proof of the contention that rights are also included in the inheritance.

In fact, there is no dispute so far as the question of the 'property' being the inheritance is concerned. The difference of opinion lies in the fact whether the rights are also included in it, or not?

Rights (Huquq)

The Muslim jurists, in general, have used the word "Huquq" (rights) in several meanings. Generally, it is used for ownership and for entitlements and to profits. Hence the word 'right' (*Haq*) is used for every such thing or matter where the *Shari'ah* has made men entitled to make demands; or has kept their interest safe from utilization by others, or has given the liberty to withhold the same or to give away to others, or power to foreclose claims of others or for relinquishing it to someone else. Sometimes the word, 'Haq' (right) is used in place of the actual thing or profit of property merely for such interests as the *Shari'at* holds them to be existing and subsisting but outwardly these interest have no physical existence (except under the *Shari'ah*). The law-giver alone holds it to be existing and subsisting, such as for a pre-emptor the right of pre-emption respecting a house, or in case of a murdered person, the right of demanding *Qisas* (blood for blood) by the heirs or the right of a husband's pronouncing divorce to his wife. All these are the rights intangible which have no external existence, but these rights are considered to be "existing and subsisting", as presumed by the *Shari'ah*.

Kinds of Rights :

A study of the subject discloses several kinds of rights which are as under :—

- (1) *Right in rem* : (i) Right of ownership of property itself is a right which is in the property itself.

من ترک مالا او حقاً فلورثته¹⁰

- (ii) *Right depending on or subservient to property* : It is the right of using at and achieving real benefit from property entirely depending upon the property itself, such as the right of residence, or the right of ascending, or the right of redemption of mortgage, or the right of cultivating the land. Such right by itself is not *ownership* in property but is considered to be subservient to property. That is to say, the right though in itself is not property but depends on the existence of property. It either arises out of property or it aids to or is related to the use of property, for instance the right of way, the right of the passage of water, the right of climbing the stairs. Same is the case with the rights of option of defect, option of the loss of essential quality, option of selection, which are the rights subservient to property and are heritable according to the Hanafis and others as well.

2. *Right in Personam* : It is the right which concerns merely the person of an individual and wherein no element of property is involved.

Analysis :—

The question of rights in property or subservient to property, being the estate of the deceased is not a matter of controversy among the jurists of different schools of law. In fact, such rights are essentially within the meaning of property. But the rights that are not attached to properties or in other words are particularly concerned with the person of the ancestor are not heritable; for instance, the donor's rights of revoking a gift made by him, or husband's right of revoking divorce pronounced by him and having recourse to the wife or the right of the custody of children of a mother, or the father's right of guardianship. But whether right which though personal yet has also in itself some characteristics of property shall or shall not be included in the estate of the deceased is the subject of much difference.

Before discussing this difference of opinion, it seems necessary to distinguish between the "right depending on property" and the "right included in the meaning of property". This will perhaps, make the understanding of the real difference of opinion more clear.

The right depending upon property and the right in the meaning of property —Distinction of :

There is a fine difference between the right depending upon property and the right included in the meaning of property. The right of realising real benefit from a property is called the 'right depending on property'. For instance, the right of residence in a house or the right of cultivating

an agricultural land, in as much as the real benefit of such land lies in its cultivation. Thus the right of residence or the right of cultivation is dependent upon the house and the land, and so the right shall be called the "right depending upon property". So far as the right of climbing the stairs for going upstairs or the right of passing through a field for going to the agricultural land is concerned, it is an aid to the making use of and realising benefit from the house and the land. Hence this shall be called "the right included in the meaning of property" not "the right depending upon property". In other words, the right of realising real benefit from the property itself shall be called the right depending on property and any right helpful in utilizing (one's own) property shall be called a right included in the meaning of property. Here, this fact may be mentioned that this distinction is made by three schools of *fiqh*, other than the Hanafis. According to the Hanafis, therefore, the rights are of only three kinds: First is the ownership of property itself, second is the right 'depending on the property or allied to property (*Tābi' Mal* or *Muta'alliq Māl*), and the third is the 'personal right'. With regard to the first two kinds of the rights, the Hanafis are convinced that they are heritable but for the third kind they say it as not heritable. There is, however, a kind which resembles both the property and the personal right. That is to say, it is a right which is neither purely the property right, nor purely a personal right. For instance, the right of a debtor to pay up the debt within a fixed period. This is, in one sense, "the property obligation" and in another sense as a personal favour having regard to the debtor's personality, his credentials, and the mutual relationship. The debtor's obligation is held to be 'personal' which is non-transferable, and soon after the death of the debtor, the fixed period (though still unexpired) lapses, the debt, becomes payable at once. But judged from another aspect the deferment of a debt is generally taken to be a property right. Thus, the debt cannot be held as independent of property and is an obligation connected with property which after the death of the debtor gets transferred to his heirs.

Whether such right resembling property and personal one at the same time is included in the estate or not, and shall it devolve by way of inheritance upon the heirs is a question to be thrashed out. There is, however, consensus of all the jurists that pure personal right of the ancestor shall not devolve upon the heirs by inheritance.

However, as regards such rights which have the resemblance both with the property right and the personal right there is a difference of opinion in the matter of its being heritable. The jurists who consider such rights to be

in the nature of property right hold that it is heritable but those who hold it to be personal right do not favour the view of its devolution by inheritance.

The practice of the majority of jurists and most of the Imams is that these rights (resembling property and personal rights) shall devolve from the ancestor through inheritance on the heirs. Whereas the rule of conduct of Hanafi jurists and the Zahiri Imam, Muhammad Ibn Hazm is that there is no devolution therein through inheritance. Hence, according to them, for example, if the pre-emptor dies after the demand of the right of pre-emption but prior to the decision of a court, the right of pre-emption shall become void and the heirs shall not acquire the right of pre-emption by inheritance. So also the option to exercise in a covenant (*Khayār al-Shart*) and option on inspection of property (*Khayār Rūyat*) shall also, on the death of that person, automatically lapse. The Hanafis and Imam Ibn Hazm Zāhiri argue that these options being based on the will and wish of man become, with the death of the man, non-existent. They are, therefore, non-heritable. The other Imams hold that these options devolve from the ancestor on the heirs in the manner of other heritables. The three other Imams and the majority of Jurists consider the right of pre-emption to be subservient and subsidiary to land and hold it to be annexed with property, whereas the Hanafis regard it to be connected with personal choice of the deceased and hold it to be "non-heritable" in as much as the intentions of a person are not heritable. In other words, the Hanafi Jurists and Imam Ibn Hazm hold the personal aspect of such rights to be preponderant whereas the other Imams give preference to the property aspect of these rights holding them to be heritable.

Conclusion :

According to this writer, the decisive factor in determining whether the right of pre-emption is heritable or not, is not merely the intention of the ancestor; rather it is a right which is really concerned with property and is within the meaning of property and in its consequence is ultimately a part of the pecuniary interest of the ancestors' heirs. That is why, this right of pre-emption ought to be heritable. The opinion of the three Imams in this connection appears to be sound. In most of the Islamic countries also it is being acted upon accordingly. For example, in Egypt the right of pre-emption, under the law enacted in 1939, is held to be a property right and thus declared as heritable." In Pakistan too, the right of pre-emption is heritable.¹²

¹¹Umar Abdullah : *Ahkām al-Mawarith*, Dar al-Ma'ārif, 1380 A.H., 1960 A.D., p. 21 :

ان قررت محكمة النقض في ٨ يونيو سنة ١٩٣٩ ع "ان حق الشفعة يورث".

¹²Punjab Pre-emption Act, 1913; NWFP Pre-emption Act, 1950.

Usufructs:

The discussion on "rights" shall remain incomplete if "usufruct or profit" is not mentioned in this connection. According to majority of jurists usufructs are in the category of property. Hence they shall be heritable. According to Hanafis, however, usufructs or profits are not heritable, because they are not property, even though such usufructs may have been gained through consideration for the use of property as it happens in case of leases or without consideration as it happens in case of Will.

According to Imam Abu Hanifah, Sifyān Thawri and Laith bin Sa'd if a person takes land, building or ship on lease for a fixed period but the lessee dies before its expiry, the lease shall stand terminated for the remaining period. Likewise, if a person makes a Will in favour of a person regarding his residence in his house for a fixed period and if the legatee dies prior to the termination of that period, the Will shall come to an end with his death. This right shall not be transferred to his heirs and they (the heirs) shall not be entitled to continue residing in the house till the remaining period under the Will. According to Imam Malik, Shafi'i, Ahmad b. Hanbal, Ishaq b. Rahwayh and Abu Thawr, on the death of contracting parties (who take and give on rent) the contract of lease does not lapse; rather it gets transferred to the heirs. According to them, the contract of lease is included in the category of contracts which become binding on both the parties and are not vitiated because of the death of any party. The exception to this rule is where there is some such cause which necessarily vitiates the contract, for instance, there is a defect in the property or the object of benefit becomes non-existent or does not remain profitable or of any benefit any longer.¹³

According to the Hanafis, if after the death of the lessee there is the risk of loss to dependants, the court has the power of passing orders for keeping intact the lease contract. It has accordingly been said in *Bada'i' al-Şana'i'* that if a person takes a land on lease for a fixed period for cultivation and before the expiry of that period the lessee dies but leaves the crop standing on the land which has not yet reached the stage of being harvested, the crop then shall be left standing on the land till it is ripe for being harvested. The heirs of the lessee shall be bound to pay the consideration that may have been fixed in the lease, because in such event if

¹³Ibn Rushd (d. 595 A.H.): *Bidāyat al-Mujtahid*, Matba' al-Mustafa al-Babi al-Halabi, Cairo, 1960 A.D., vol. ii, p. 230; *Rahmat al-Ummah*, o.m.o. *Al-Mizan al-Kubra*, Matba' al-Mustafa al-Babi al-Halabi, 1359 A.H., 1940 A.D., vol. i, p. 221.

the crop is ordered to be harvested the lessee's heirs shall be put to loss and if the crop is ordered to remain intact without consideration the lessor shall be put to loss. It shall be possible to avert the loss to both of them by allowing the crop to remain unreaped and paying compensation to the lessors or his heirs as the case may be. Though it has also been held that if the lease-holder dies the lease shall become void. Yet, if there is some valid reason, the lease shall not necessarily become void. It has also been said that if after the death of the lessee the heirs of the lessor and the lessee agree to keep the contract alive the lease shall continue and it shall be treated as if a new contract has been brought into existence.

Thus, in accordance with the viewpoint of Hanafis, if the contract, under which the proceeds or benefits are obtained, suddenly terminates due to death, the heirs of the deceased and the beneficiaries are put to loss, it shall, in that event, be necessary that through a new lawful contract made between the heirs and the beneficiaries this loss be averted and the period of this new contract be fixed till the time the loss is made up. At the end of this period the original contract shall be considered as concluded. If the parties thereafter agree, they may re-enter into a fresh contract. Otherwise the contract shall be considered having come to an end except where a different intention appears from the contract itself. For instance, a person takes a land on rent for cultivation, or takes a house for residence, but prior to the completion of the period the lessee dies or the crop on the land is not ripe. In such an event by holding the contract made by the deceased lessee lapsed, according to Hanafis, some loss necessarily accrues to the heirs of the lessee if the crop is removed from the land or the heirs of the deceased are ordered to vacate the house immediately, because in the first case the crop shall go to waste and in the second case the finding of another house immediately may be difficult. Hence, the contract should legally be considered to be continuing or renewed for a fixed period or it should be open to the court to get a new lease executed between the heirs of the lessee and the owner of the land or the house for such time that the crop is ready for harvesting and another house is available for residence. At the end of that time the parties may either re-enter into a contract or the lessee may vacate the land and the house.

Conclusion :

According to this writer, if it is specified in the lease contract that the legal heirs of the parties as well are included in the definition of parties, the contract of lease shall not be annulled because of death of any party. The tenancy right, in urban immovable property taken on rent, has been held to be heritable¹⁴ in Indo-Pak sub-continent. This would be inevi-

¹⁴Ibn Nujaym : op. cit., vol. vii, chap., *Al-Krāhiyat*, p. 207.

table nowadays in view of the extreme difficulty in getting property on lease because of the emergence of the highly commercial and economic society. In fact, the devolution of user and profit from property through inheritance should mainly depend on the custom and practice prevalent in each society. In this respect, the viewpoint of the three Imams appears to be nearer the present day demands.

Existence of the estate :

The existence of the estate of the deceased is the third basic factor in the exercise of right of inheritance. Hence, if a person dies and leaves behind him no heritable property there shall arise no question of inheritance. If the deceased leaves no estate and there is a debt due on him, the debt shall not be due and recoverable from the heirs in as much as the creditor's right is linked with the estate of the deceased and not with the person or the self-acquired property of the heirs. In such a case, therefore, the presence or otherwise of heirs is immaterial. If an heir, inspite of there being no estate left by the deceased pays up the debt due from the deceased, his action shall be *ex-gratia* for which he shall be entitled to get a reward in the next world.

Legal character of the estate :

In the event of the deceased leaving some property it is essential that the same be lawful and lawfully acquired. The unlawful and forbidden property or pecuniary rights, therefore, cannot be considered to be open to inheritance under the law of *Shari'ah*, for instance wine stores or money won in horse racing or obtained by fraud, usurpation or as bribe or *riba*.

Where legal character is given by some Muslim countries (including Pakistan) under their laws in force to the property and the rights that are unlawful under Islamic Shariat, the question will arise as to their inheritance and the form that they shall take under the *Shari'ah*. Will they be included in the estate or not? For instance, wine stock and money won in lottery and races and the money drawn from insurance and immoral films or obtained as *riba* (interest).

The point of view of this writer is that in such countries wherein lottery, races, liquor trade, bank interest and insurance business have received legal sanction they shall be governed under their own laws and the heirs in these countries shall have the right of getting such properties of the deceased included in the estate and sharing them in accordance with the laws in force in those countries, not as the dictate of *Shari'ah*.

It is said in *Bahr al-Rāiq* that if a person dies and his estate, for instance, consists of the price of wine or be property gained through usurpation and bribe, it is incumbent under *Shari'ah* upon the heirs to abstain from sharing this estate. If they know the real source of the same they should return those properties to their owners but if they do not know they should make a pious offering of them."¹⁴ It is clear from the above that if the estate consists of unlawful property it is not *Halal*, (legal) for the heirs to take it as inheritance. If they receive a share out of such property they shall be committing sin by receiving it. It is, thus, obligatory on them to give it away to some needy persons as *Kaffarah* (expiation) of the said sin. This may at least apply in case of those properties which are manifestly unlawful in their nature and have come to the hand of the heirs.

Accretions :

The last question that remains is that if after the death of the ancestor there is some accretion in the estate how shall it be dealt with ? According to the Hanafis, the increase in the estate that takes place after one's death shall be considered as reserved in the interest of the creditors, if any. But according to majority of the Shafi'i jurists the creditors shall have no right over the said increase. In the event of the estate being already mortgaged the Hanafi point of view appears to be more relevant.

Section 284. There are four conditions for inheritance :

Conditions for Inheritance (1) Proof of actual or legal death of the deceased.

(2) Proof of actual or legal life of the heir on the death of the ancestor.

(3) Degree and kind of relationship wherein the heir and the ancestor are placed.

(4) The existence of estate open to inheritance.

COMMENTARY

There are four conditions for the right to inheritance :

(i) That the ancestor must be factually or legally dead.

(ii) That the heir at the time of death of the ancestor must be alive, factually or legally.

- (iii) That the relationship between the heir and the deceased be known so as to establish entitlement.
- (iv) That there be property for inheritance.

But the right to inheritance can be enforced only after the burial of the deceased, payment of debts and the execution of a valid Will, if any, to the extent of one-third of the estate.¹⁵

Section 285. There are under Islamic law two grounds of inheritance :—

Cause of Inheritance

- (1) Lineage or Consanguinity.
- (2) Marriage or Affinity.

COMMENTARY

By Lineage or Consanguinity :

Lineage means that relationship of full blood which by descent exists between the ancestor and the heir, although that relationship may have been established by the acknowledgment. There are three kinds of relationship by lineage :—

- (a) That which originates from the deceased. That is to say, 'the progeny of the deceased' howsoever low in degree.
- (b) That from which the deceased originated. That is to say, 'the progenitor of the deceased' (parents, grandparents) howsoever high in degree.
- (c) That, besides the progeny and the progenitor, all other relatives i. e. the relative by blood (sister, brother, uncle).

By Marriage or Affinity :

The relationship by marriage is established in Islam directly between the spouses through a valid marriage contract, provided the cause (married state) is fully established and be existing at the time of death of the spouses (wife or husband). The inheritance does not devolve in case of invalid

¹⁵Damad Afandi (d. 1078 A.D.): *Majma' al-Anhur*; Abdullah b. Mahmūd b. Mawdūd: *Al-Ikhtiyar li ta'lil al-Mukhtar*, Cairo, 1370 A.H., 1951 A.D., vol. v, p. 85 :

”وانه يقتضى تاخر القسمة من الدين والوصية: . . . فهذه الحقوق الاربعة تتعلق بتركة الميت على هذا الترتيب“

or void marriage (Vol. I, pp. 104, 108 *Supra.*)¹⁶ Likewise, the relationship with the 'in-laws' is no cause of inheritance. That is to say, the relationship through husband or wife cannot be the cause of inheritance, except that there be any other relationship by *nasab* between them which may otherwise entitle them to inheritance.

Modern Legislation—Law of Inheritance :

Egyptian Law : Causes of inheritance are: marriage, consanguinity and causative '*asubat*'. Inheritance in connection with the married state shall be in the form of fixed shares. Inheritance by consanguinity shall sometime be by way of *Farḍ* (as fixed share-holding) or '*Asubat* (consanguinity) or shall be by both ways or through "womb relationship" but therein regard shall be had to the rule of exclusion. When an heir has two grounds for inheritance, he shall, in accordance with both the causes, be the heir under Sections 14 to 37. (Section 7).

Syrian Law : (1) Grounds of inheritance are marriage coverture and consanguinity.

(2) There are three varieties of inheritance: (i) *Farḍ'id* (fixed shares) that are ordained by the Holy Book of God, (ii) from '*Aṣubat* (consanguinity), (iii) through a female, (womb relationship).

(3) Inheritance on account of marriage shall be on the pattern of *Farḍ* fixed share-holding).

(4) Inheritance on account of relationship shall sometime be by way of *Farḍ* and sometime by way of '*Aṣubat* and sometime by both or through female (womb) relationship. When there exist two grounds of inheritance for an heir, he shall be entitled to the inheritance on both the grounds but in this respect regard shall be had to the provisions of Sections 171 and 296. (Section 263).

Moroccan Law : As the grounds of inheritance have been determined under *Shari'āt* it cannot be obtained through a contract nor can it be interfered with through a Will. Hence, desavowal of any qualification by the heir or ancestor is ineffective nor they have power to transfer the right of the inheritance to non-heirs. (Section 224).

¹⁶Al-Haskafi, 'Alā' al-Din (d. 1088 A.H.) : *Al-Durr al-Muntaqa*, o.m.o. *Majma' al-Anhur* Dar al-Matba' al-'Amirah, Cairo, 1328 A.H., vol. ii, p. 747:

”لا توارث بفساد ولا باطل اجماعاً“

The ground of inheritance is either marriage coverture or relationship (Section 225).

Relationship encompasses six forms: (i) Paternity; (ii) Maternity; (iii) Grand Parentage; (iv) Issues; (v) Brother & Sister; and (vi) Father's Sister. (Section 226).

The following conditions are essential for the right to inheritance:—

1. The actual or legal death of the ancestor.
2. The heir being alive at the time of opening of inheritance.
3. The determination of the cause or ground of inheritance. (Section 227).

CHAPTER XXXIV

Rights in Relations to Estate

Section 286. The following rights relate to the property of the deceased; some of them have preference over the others.

Rights in relation
to estate

1. Expenses for funeral rites and ceremonies of the deceased.
2. (a) Discharge of others' rights attached with the property itself left by the deceased.
(b) Payment of debts due on the deceased out of the property of the deceased.
3. Putting the Will, if any, into execution (after discharge of the above obligations) to the extent of one-third of the remaining estate in favour of non-heir, if the Will is enforceable in *Shari'ah*.

Explanation : In case of the Will being of more than one-third or being in favour of an heir its being put into effect shall depend upon the consent of the heirs.

Exception : In case of the legator being Shi'ah the Will in favour of heir to the extent of one-third without the consent of the heirs shall be valid and enforceable.

4. The remaining estate shall be divided among the heirs in the light of the mandates of the Holy Qur'an and the Sunnah of the Prophet and his Companions.

COMMENTARY

Prior to the opening of inheritance the following obligations are to be discharged from the estate of the deceased :—

1. Funeral rites and ceremonial expenses in connection with the burial of the deceased.

2. Debts on the deceased.
3. Wills in favour of non-heirs.

Funeral rites and ceremonies:

After the death of a Muslim the expenses that are the first charge on the estate are of two kinds:—

- (a) The obligations in respect of the deceased himself; and
- (b) The rights of others against the deceased.

Obligations in respect of the deceased himself :

The foremost obligation in respect of the deceased himself is the funeral rites and ceremonies. It includes all the expenditure in coffin and the burial. According to some Jurists the payment of debt against deceased has precedence over *tajhiz* (coffin and the burial) as is said by *Mulla Mi keen*, but the report regarding debt having precedence over "*tajhiz*" is incorrect. The correct position is that funeral rites and ceremonies have precedence over the payment of debts.¹ Hence the funeral rites and ceremonies following the death of the deceased shall be performed first and expenditures met from his estate. The arguments in support thereof are based on Sunnah as well as Qiyas.

Argument based on Sunnah : The Prophet, (peace be on him) at the time of leading the funeral prayers used to enquire whether the deceased owed any debt. If the answer was in the affirmative he himself would not lead the prayers; rather he asked some of his Companions to lead the prayers. The Prophet by this practice meant to draw attention of the Muslims towards the importance of making payments of debts due against them during their lifetime. He did not mean thereby that debts had precedence over the funeral rites and ceremonies expenses of the deceased. When Haqrat Hamzah was martyred in *Ghazwah Uhad* the Prophet did not enquire about his debts prior to his burial. The conclusion inferred from this report too is that debt has no precedence over funeral rites and ceremonial expenses.² Besides, the funeral prayer follows coffin; the tradition thus gives a sufficient indication that the *tajhiz* and *tadfin*, burial has got precedence over the payment of debt due against the deceased. Further,

¹ *Al-Durr al-Muntaqa* : op cit., vol. ii, p. 746.

² Al-Sarakhsi, Shamsuddin (d. 483 A.H.): *Al-Mabsūt* Matba' al-Sa'adah, Cairo, 1324 A.H., vol. xxix, p. 136.

there are a number of traditions reported from the Holy Prophet emphasising the burial at the earliest, which also go to prove indirectly the rule of precedence.

Argument based on Qiyas : The shroud of the deceased has the same position after his death as has general dress in his lifetime. Therefore, as the dress on a debtor's person can not be attached or sold in execution of a decree passed against him,³ in the same manner after his death the arrangement of his funeral rites and ceremonies has precedence over the payments of his debts.⁴ Indeed, in performance of his funeral rites and ceremonies regard shall be had to his estate and the general standard of his living.

Wife's Funeral Expenses :

According to the authentic assertions of the Hanafis and Shafi'is the obligation of meeting the expenses of a persons wife's funeral rites and ceremonies corresponds with that of the husband's status and shall be borne by him.⁵ Hence expenses regarding wife's burial shall not be met from her estate inspite of her being wealthy. The opinion reported from Abu Hanifah (as against the opinions of Hanafi jurists in general), and also from Imam Malik and Ahmad b. Hanbal is that if the wife leaves behind her own property, her burial expenses should be incurred from that property. The approved assertion of Imam Ahmad b. Hanbal, however, is that the incurring of expenses of funeral rites and ceremonies of the wife is in no way obligatory upon the husband.⁶ If she leaves behind no property,

³Ibid; Sec. 60, Civil Procedure Code, Pakistan, 1908.

⁴Al-Sarakhsi : op. cit., vol. xxix, p. 137; Damad Afandi : op. cit., vol. ii, p. 746; Ibn Nujaym : op. cit., vol. viii, p. 489; Abdullah b. Mahmūd : op. cit., vol. v, p. 85.

⁵*Al-Durr al-Muntaqa* : op. cit., vol. ii, p. 746; Al-Firozabadi Ibrahim b. Ali b. Yusuf (d. 476 A.H.) : *Al-Muhazzab*, Matba' Mustafa al-Babi al-Halabi, Cairo, 1379 A.H., 1959 A.D., vol. i, pp. 136-37.

⁶Al-Shi'rani, Abdul Wahab (d. 973 A.H.) : *Al-Mizan al-Kubra*, Matba' Mustafa al-Babi al-Halabi, Cairo, 1359 A.H., 1940 A.D., vol. i, p. 222; Abul Barkat, Majd al-Din, Abdul Salam (d. 652 A.H.) : *Al-Muharrar*, Matba' al-Sunnah al-Muhammadiyah, Cairo, 1369 A.H., 1950 A.D., vol. i, p. 192.

according to Imam Malik, the expenses of her funeral rites are obligatory upon the husband. Imam Muhammad b. Hasan Al-Shaybani is strongly of the view that the expenses of funeral rites and ceremonies of the wife who leaves no estate be met from *Bait al-Māl*. There is, however, consensus of opinion that the funeral expenses of the wife shall be met out of the *Bait al-Māl*, if the husband is penniless. The Shafi'i rule is that if the deceased leaves no estate his funeral expenses will be met by the person who was responsible for the maintenance of the deceased during his lifetime. Same is the practice of most of the Maliki jurists and of Ibn Hazm Zahiri. Hence according to Maliki and Hanbali schools of fiqh the burial expenses of the wife shall be met out of her own property inspite of the husband being wealthy. Their argument is that the funeral rites and ceremonies expenses belong to the same class as that of the maintenance of the wife which is obligatory upon the husband. As the maintenance of the wife comes to an end with her death, the responsibility of her burial expenses cannot be laid upon the husband except when the property of the wife is not sufficient for meeting her burial expenses.

Conclusion :

According to this writer, this argument of Malikis and Hanbalis is defective, inasmuch as their first premise, in this respect, is that the funeral expenses are of the class of maintenance. It, therefore, follows that after death the funeral expenses should replace maintenance, because no question of funeral rites arises during the wife's lifetime. Hence, if the funeral expenses are at par with maintenance their incidence shall be after death, not otherwise. The question arises that if the funeral expenses are not made obligatory there is no occasion for the argument that they are of the same class as maintenance.

Hence the first premise of the Malikis and the Hanbalis if is taken to be correct the responsibility of funeral expenses as well should be that of the husband. As the fulfilment of wife's requirements in her life-time is the responsibility of the husband, so must the responsibility of fulfilment of wife's requirements after her death (i. e. expenses for her funeral rites and ceremonies) remains with the husband. The argument of Hanbalis that being of the class of 'maintenance' the responsibility of funeral rites shall not rest with the husband after her death is wrong in as much as the relationship of married state in its effects and results does not totally lapse soon after the death of the wife. It is considered to

be subsisting for several lawful purposes. Some lawful object rather flow from the wife's death, for example the heirship.

Zakat due against the deceased :

If the payment of Zakat or penalty offerings (expiation) are due against the deceased, then according to the Shafi'i 'Ulama, their payment is obligatory prior to expending on funeral rites and ceremonies. According to Hanafi 'Ulama, however, as the liability of *Zakāt* (or expiation) due on the deceased lapses with his death, such payment is not incumbent. Indeed if the deceased has made a 'Will' regarding the payment of *Zakāt* or expiation the Will can be acted upon to the extent of one-third after the expenses of funeral rites and ceremonies and the payment of debts have been met.⁷ The details of the same will follow later on.

Rights of others against the deceased :

The Jurists have classified the "rights of others against the deceased" in to two categories :

1. God's Rights.
2. People's rights.

There are, under law, two main kinds of rights that could be due against the deceased. The first is God's right as the offering of prayers, going on Haj (pilgrimage to Macca) etc. The other category consists of rights which he owes to others such as debts etc.

Hanafi Rule : In this connection, the first question is that of the preference between God's rights (*huqūqullah*) and people's rights (*huqūqul 'Ibad*). According to Hanafis, God's rights due on the deceased end with the death of the deceased in the manner that payment on that account shall not be made out of the estate of the deceased. For instance, a Muslim died. Haj was due on him, but he had not performed it, or some expiation was incumbent upon him, but he did not expiate it or the *Zakāt* was due on him but he did not pay it. All these obligations to God lapse on account of his death except when he has made a Will regarding their performance. In such event, the Will may be put into effect to the extent of one-third of the estate in accordance with the dictates of the *Shari'ah*.

The Hanafis distinguish the case of people's rights from God's rights. The discharge of the former from the estate of the deceased has, under

⁷Syed Sharif al-Jurjani, *Al-Sharifiyah*, Karachi, p. 6.

law, been made obligatory upon the heirs. Thus, under the mandate of the Qur'an⁸ and the direction laid down in the *Hadith*,⁹ the estate of the deceased can be divided among the heirs only after the discharge of the rights of others against the deceased and execution of his will, if any, according to law.

The Hanafis, in support of their view, advance several arguments as under :

1. The first argument is that debt and *Zakāt* are two different categories of liability. *Zakāt* is without consideration, whereas debt is always a liability for some consideration. That is why, the Hanafi jurists do not consider *Zakāt* and *Kaffarah* (expiation) to be debts.
2. The second argument is that God is Benevolent and Gracious. People's right, therefore, has the prior right, except when the deceased has made a Will for discharge of God's rights. In that event, the Will for the payment of *Zakāt* like the payment of people's debt shall be acted upon. It shall be acted upon as a Will to the extent of one-third of the estate that shall be left over after the expenses of funeral rites and ceremonies have been met and the people's debts have been paid.
3. The third argument is that the intention and performance are fundamentals of every mandatory act of devotion. With death a man's intention and action both come to an end. Hence there remains no mandatory obligation on him. As against this, in the discharge of people's rights one's own intention and capability to act are irrelevant. For instance, if property of a debtor without his consent comes into the hands of his creditor, he may keep it to himself and appropriate the same towards the debt due on the debtor.¹⁰

⁸Al-Qur'ān, Surah, Al-Nisa, iv : ii :

”من بعد وصية يوصى بها او دين“

اقضوا الديون قبل ان تجلد الميت⁹

¹⁰Abu Zahra (d. 1974 A.D.) : *Ahkām al-Tarkāt wal Mawarith*, Dar al-Fikr al-Arabi, Cairo, p. 39; Al-Sarakhsi : *Al-Mabsūt*, 1324 A.H., Cairo, vol. xxix, p. 137; Al-Zayl'ī (d. 743 A.H.) : *Tabyīn al-Haqa'iq* (commentary on *Kanz al-Daqa'iq*, Al-Matba' al-Amiriyyah, Cairo, 1313-15 A.H., vol. iv, p. 230.

Other Views: As against this, the viewpoint of the three other Imams of Sunni School and of Imam Ibn Hazm is that God's rights do not lapse with one's death. Obligation to God, according to Māliki jurists, shall be discharged but however, after discharging the people's obligations. That is, the people's debt shall be paid after meeting the expenses of the funeral rites and ceremonies. Thereafter the obligation is to discharge God's rights, for instance *Zakāt*, *Fitrah* (Offerings on the occasion of fast ending festival, Eid-al-Fitr) and *Kaffarah* (expiation) which the deceased should have confirmed as due in his state of health whether he had made a Will regarding them or not. The Shafi'i jurists have, on the other hand, given precedence to obligations one owes to God over those to the people, where the estate is not enough for discharging both of them. The Hanbali jurists make no distinction in the discharge of obligations to God and those to the peoples. They hold discharging both of them on equal footing. Hence they agree on the duty to discharge God's rights and people's rights together, after discharging the debts on the real estate of the deceased. Imam Ibn Hazm, in this connection, is very strict. According to him, first of all obligations to God shall be discharged and thereafter shall be discharged those of the people and only then the funeral rites etc. of the deceased should be performed. If there is no property left, the responsibility of his funeral rites according to Ibn Hazm, shall be of those creditors who may be present on the occasion.¹¹

Shafi'i 'Ulama and Imam Ibn Hazm who positively hold giving precedence to God's rights on people's rights cite, in support of their view, the Prophet's sayings : (i) "God's debt is more deserving of discharge than of others" and (ii) "Pay up God's debt as it is more deserving of payment."¹²

It is stated in *Sahih al-Bukhari* and *Muslim* that a man appeared before the Prophet and said "My sister had vowed to go on pilgrimage to Macca. She died without carrying out her vow. Should I make the pilgrimage in her place ? The Prophet asked, "Had there been a debt of someone due on your sister, should you not have paid it up ?" He replied, "Undoubtedly, I should have paid up". The Prophet said, "God's debt is more deserving

¹¹Al-Shi'rāni : *Al-Mizan al-Kubra*, Cairo, vol. i, pp. 222-23; Ibn Hazm (d. 456) ; *Al-Muḥallā*, Cairo, 1352 A.H., vol. vi, p. 309.

¹²Ibn Hazm : op. cit.,

(i) دين الله حق ان يقضى - (ii) اقضوا الله فهو احق بالوفاء -

of being paid up".¹³ Imam Shafi'i and Imam Ibn Hazm dealing with the above question give preference to God's rights over the people's rights on the basis of this "Hadith", whereas the Hanafis give preference to fulfilling God's rights after one's death only in the case of a Will to that effect. According to them, the act of the brother in the above tradition was gratuitous and not obligatory. That is to say, the brother acted gratuitously for his sister; it does not argue that the act was obligatory.

Conclusion : According to this writer, the decision of the question of precedence as to discharge being obligatory or otherwise in the matter of God's right and people's right the foremost importance should be given to the fact whether God's right and its effect is restricted to the person of the deceased himself i. e. the effect thereof is merely limited to the person of the deceased or it extends to others and the society as a whole. Thus, the effect of offering prayers, observing fasts and going on pilgrimage to Macca remains intimately and solely limited to the person of the deceased himself, whereas the effect of paying *Zakāt* is not limited to the person of the deceased himself but extends to the financial betterment of other individuals and the society as a whole. The Hanafi jurists who consider the payment of *Zakāt* comparable to offering daily obligatory prayers hold it to be based on the intention and performance of its offerer. There is room for differing with the point of view of the Hanafis that giving of *Zakāt* is merely a devotional obligatory act, i. e. exclusively an act of worship, '*ibādat*. If it is in the same class as the prescribed daily prayers and it is one performed by means of property which, in accordance with the words of the Qur'an,^{13a} is the right of the society. Here the relevant question is whether a Muslim if he is a man of means (property) but does not intend to offer (*Zakāt*) can be compelled by the Islamic state to pay the *Zakāt* and can it be recovered from his property during his lifetime? *Zakāt* is not only an important head of income for the state treasury but is the main pillar of Islamic economic system which, in terms of the Qur'ān, is ultimately meant for the well being and prosperity of the Muslim society, particularly poor

¹³Al-Bukhari (d. 256 A.H.) : *Al-Ṣaḥīḥ*, vol. ii, p. 991:

”عن ابن عباس قال أتى رجل النبي صلى الله عليه وسلم فقال ان اختي نذرت ان تحج وانها ماتت فقال النبي صلى الله عليه وسلم لو كان دين عليها دين اكنت قاضية“ قال نعم قال فاقض دين الله فهو احق بالقضاء“ -

^{13a} ”حق معلوم للمسائل والمجروم“

and needy persons. Hence, if *Zakāt* becomes due on a Muslim in his life-time and he dies without making payment of the same, it should not be considered to have lapsed. This writer, therefore, agrees with the viewpoint of the Shafi'i jurists who held that *Zakāt* due on the deceased does not lapse. In accordance with the Qur'anic injunctions, the *Zakāt* is for the benefit of Muslims who ask deservingly and the needy and that is held to be the right of God. Indeed to hold *Zakāt* to be God's right in a manner that it gets altogether excluded from people's right seems to be against the behest and intent of the Qur'an.

Rights of Others :

The rights of others against the deceased may be classified as under :

1. Debt attached to some specific property of the deceased.
2. Debt, simple (General).

Debt attached to property :— If the debt is attached to an object i.e. attached to a particular property, such as a property mortgaged, and has no other property except the mortgaged property the first charge on it shall be that of the mortgagee. The mortgaged property is to be sold and the debt is to be repaid. This has priority even over the expenses of funeral rites because a property which is mortgaged is not yet considered to be the estate of the deceased, until another's right attached with it is paid off.

Debt simple (general) due on the deceased :— Funeral rites expenses as has been stated above have priority over all other rights concerning the estate of the deceased. After it, the second charge on the estate is the debt due on the deceased. Hence the creditor's right, in the event of there being a debt due on the deceased of realising his debt extends to the entire estate, whether debt incurred is of the period of his sound health or borrowed during his sickness, proved by his admission or evidence.¹⁴

Debt's Precedence over Will :

Payment of debt due on the deceased has precedence over the execution of his Will, although the mention of Will in the Holy Qur'an comes first,

¹⁴Al-Jurjānī, Syed Sharīf : *Al-Sharifiyyah*, Karachi, pp. 4, 5, 6 :

”كل حق للمغير تعلق بعين الشركة فانه مقدم، على تكفينه كالدين متعلق بالمرهون“
 ”ثم يبدأ بقضاء دينه من جميع ماله الباقى بعد التجهيز والتكفين“ - فان كان الكل دين
 الصحة اعنى ما كان ثابتاً بالبينة او بالانوارفى زمان الصحة -

but the order of their mention in the Holy Qur'an does not necessarily indicate the precedence. Secondly, Haḍrat 'Alī has said, "I have seen the Prophet that he used to pay off debts prior to the execution of the Will of the deceased."¹⁵ Another indication of the debt having precedence over Will is that the payment of debt is obligatory whereas making of the Will is desirable.¹⁶ The demand of *Qiyās* is also the same.

Order in payment of debts :—

The jurists have classified debts in two further categories. One is the debt incurred by the deceased during his state of sound health and the other is the one incurred during death-illness. This distinction observed by the Hanafi jurists denotes their acute appreciation of law. Debts incurred during sound health, as Allama Ibn 'Abidin observes in his noted book "*Radd-al-Muhtar*"¹⁷ shall include debts which stand proved by evidence, irrespective of whether or not they were incurred in sound health or during death-illness. They will also include the debts proved by admission during sound health. The debts admitted by the deceased during the death-illness (i.e. not proved by evidence or observation) shall be classified with debts incurred during death-illness. So far as the payments of these debts are concerned the difference lies in the fact that after the burial expenses of the deceased have been paid the debt incurred during sound health shall get precedence over the debt incurred during death-illness. Thus, the debt incurred during death-illness and admitted by the deceased during his death-illness, shall be considered at par with his Will and as such it shall be the first charge against one-third only of the estate of the deceased.

The Hanafi jurists at first maintain this distinction on the basis that there is no means of proving this debt except the admission of the deceased made during his death-illness. Secondly, it has often been seen that people by their neglect in the matters of their property at the time of their death become instrumental in depriving the other entitled one's from their just rights. As against this, according to the three other Imams the debt gets

¹⁵ Ibn Nujaym : *Al-Bahr al-Ra'iq*, op. cit., vol. viii, p. 489 :

"وقد شهدت النبي صلى الله عليه وسلم قدم الدين على الوصية"

¹⁶ Ibid :

"ولأن الدين واجب ابتداء والوصية تبرع والبداءة بالواجب أولى"

¹⁷ Ibn 'Abidin (d. 1252 A.H.) : *Radd al-Muhtar*, Cairo, 1327 A.H., vol. v, p. 536; *Al-Jurjani* : op. cit., p. 6.

satisfactorily proved even by mere admission of the deceased during his death-illness. This is so because men in their last moments, according to general observation, get closer to God. Hence their admissions then being safe from untruths the debts incurred during their death-illness shall be considered to be at par with the debts incurred during their sound health, although, in proof of the debt incurred during their death-illness, there may not be anything except the admission of the deceased made during his death-illness. All the Imams, therefore, are agreed on the point that all those debts which have been incurred during sound health of the deceased they all shall be payable in equal degree. None shall get precedence, *inter alia*, over the other. Similarly, if all the debts have been incurred during death-illness they shall be payable in equal degree and none shall get precedence over the other. If, however, some debts have been incurred during sound health and some during death-illness it shall have to be seen whether those debts that have been incurred during death-illness are proved by evidence, or by admission made in sound health, or are merely admitted by the sick person during his sickness. If the admission of the debts incurred during death-illness is proved by evidence or heirs witnessing those, the debts incurred in sound health and the debts incurred in death-illness both shall be of the equal degree. If, however, the debt incurred during death-illness is merely admitted by the sick person, the debt incurred during sound health, according to Hanafis, shall get precedence in comparison to such debts incurred during death-illness. Although in so far as the liability of paying up the debts itself is concerned both the debt incurred during sound health and the debt incurred during the death-illness are at par, for instance:—

- (a) A person dies and there is a residue of rupees two thousand of his estate after the expenses of his funeral rites and ceremonies. There is a debt due on him of the same amount incurred during his sound health. Besides, there is the admission of a debt of rupees one thousand during his death-illness (for which there is no proof except his own admission). According to Hanafis the debt incurred during sound health shall, in the circumstances, be paid at first. In that event, no residue of the estate remains and the creditors whose debts were admitted by the deceased during death-illness shall get nothing. According to the other three Imams both the kinds of creditors shall receive the payment in proportion to their debts.

- (b) A person dies and after the expenses of his funeral rites and ceremonies have been paid there remains a sum of three thousand rupees in cash. There is a debt of rupees two thousand incurred by him during his sound health and there is a debt of rupees one thousand admitted by him during his death-illness. In the circumstance, according to Hanafis after the payment of the debt of rupees two thousand incurred during sound health, one-third of the one thousand shall become payable according to the law of Wills in favour of the said latter creditor in as much as during one's death-illness the heir's right, in a way, gets involved with property of the deceased. Hence, though the admission of the said debt during death-sickness shall be a good proof against the sick person, it shall not be so against the heirs as well. As against this, the other three Imams are in agreement that it is obligatory to pay up both kinds of debts as debts incurred during sound health, and so, according to them, there remains nothing for the heirs.

Abū Zahra in his book "*Ahkam-al-Tarkat wal Muwarith*" (pp. 14-15 and 35-36), writes about the order of precedence in the matter of payments of (1) debts that are not attached with specified properties but stand proved by observation, evidence or admission during sound health, or (2) debts which stand proved during death-illness by evidence, or (3) debts that get established in a reasonably and satisfactory manner by act of a sick person during death sickness; for instance, he makes purchases or borrows from someone which in fact is in the knowledge of all concerned. All such cases of the debts shall be considered to be in the category of debts incurred during sound health. But the debt that stands proved merely by the acknowledgment of the sick person during his death-illness, and there is no other proof of the same, shall be called as "Debt incurred during death-illness". This distinction is only according to Hanafis; there is no such distinction according to the views of other jurists, on the subject. According to the latter, all kinds of debts are concerned with the estate of the deceased in equal degree. The viewpoint of Hanafis, in this connection, is based on minute and deep appreciation of the matter and appears to be more akin to correctness.

Nature of the heir's right during death-illness :

Here the question arises as to what is the nature of the heir's right that gets involved or attached with the property of his ancestor during his

death-sickness. Whether it is a right in the nature of ownership of the property or it is merely a right of raising objection, involving precedence of, in the matter of debt and legacy. According to one group this is a right in the nature of ownership of the heir in the property of the deceased whereas according to the viewpoint of another group this is a mere right of raising objection as to incurring liability during death-sickness, and gets confirmed as similar to right of ownership on the occurrence of death. The viewpoint of the latter, in this connection, appears to be more reasonable. The heirs, therefore, cannot use their right of raising objection to their incurring liabilities during the lifetime of the ancestor. As against this, the creditors can use their right of raising objection of incurring further liabilities by the deceased to the extent of their debts incurred both during his death-sickness as well as during the state of health. There is no disagreement among the jurists on this point inasmuch as the claim of creditors is firmly established in the value of property similar to the right of ownership. The fact remains that whatever disposition the ancestor makes of his property during his death-sickness the heir's rights therein have been protected in the manner that such disposition in the property may not exceed the one-third of his estate except when he disposes of the property for meeting his real personal requirements. As a consequence, the rights of the creditors have also been protected. Thus, if in such property dispositions gross misappropriation i.e. extreme recklessness is proved they shall be held to be invalid whether or not the estate be more as compared to the debt. Similarly if the debtor during his death-sickness gives away to someone his property in gift or sale which is proved to have been made with the purpose of defeating the interest of the creditors, the creditor may get that transaction invalidated, not only in the lifetime of the debtor but even after his death.

Conclusion :

Hanafi View : According to the Hanafis, in the discussion of rights concerning estate the rights attached to a particular property are the first to be discharged. Next comes the expenses of funeral rites and ceremonies. Then comes the people's rights i.e. the debts owed by the deceased which shall be paid provided the debts stand established by evidence, observation or admission of the deceased made during his sound health. God's rights (Zakāt etc.) against the deceased stand as lapsed; only in case of Will such rights, under relevant rules, may be put into force. That is to say, after the

people's rights comes the Will and last of all the distribution of estate among the heirs shall be in order.

Maliki View : According to Malikis, after discharging the rights attached with a particular property and meeting the expenses of funeral rites and ceremonies the people's rights (not attached with any particular property) whether they are debts incurred during sound health or death-illness shall be paid up. Next is the turn of God's rights, (e.g., Zakāt etc.), followed by Will, if any, and then comes inheritance i.e. distribution of the remaining estate among the heirs.

Shafi'i View : According to Shafi'is, after the expenses incurred in connection with funeral rites and ceremonies, God's rights (e.g., Zakāt) shall have precedence over all. After those rights have been discharged there is the turn of people's right whether it is a debt incurred during sound health or death-illness. Lastly is the turn of Will and then inheritance opens for the heirs.

Hanbali View : According to Hanbalis, first of all is the meeting of the expenses of funeral rites and ceremonies; next is the turn of payment of debts attached with a particular property, then follows the discharge of people's rights and Gods' rights together (in the event of the estate being less with proportionate reduction); next is the Will and thereafter inheritance is opened for the heirs entitled to it.

Zahiri View : The Zahiris give first place to the fulfilment of God's rights, next is the carrying out of people's rights, then follow the expenses of funeral rites and ceremonies, followed by the Will, if any, and lastly the distribution of the remaining estate among the heirs.

Position of the estate till payment of debt :

According to the Hanafis, as long as the estate of the deceased is wholly or partly covered by debt it shall not be transferable to the ownership of the heirs. According to Hanafi jurists in general, when debt encumbers the estate, either whole or in part, this shall be a hinderance to the ownership of the heirs. There is an assertion reported from Imam Abu Hanifah also to the same effect. However, another assertion from him is that the debt in case of not covering the entire estate is not, in any manner, an impediment to the ownership of the heirs in as much as the heir is the deputy of the ancestor regarding his property. Just as in the lifetime of the owner the entire property alongwith the debt thereon was

owned by him the property being under mortgage, so also the heir shall be the owner of the property under debt. In support of their view the Hanafi Jurists in general rely upon the verse of the Holy Qur'an "من بعد وصية يوصى بها أو دين" (IV-11). God has, in this verse, fixed the time of opening of inheritance after the payment of debt and execution of Will, if any. A law can not be applied before the time fixed for its enforcement. Hence the opening of inheritance shall not precede the payment of debt. Moreover, the heir is the deputy in that property which is in excess of the liabilities of the ancestor. The heir can not be the deputy of his ancestor in the property which is submerged under the liabilities of the deceased. So, if the debt submerges the estate, the property shall not be open to other requirements except the liabilities of the ancestor, which shall be an impediment to the ownership of that estate in favour of the deputy. It can not, in the circumstance, be argued that the estate is left without an owner, rather it shall be considered as owned to the extent of debt by the creditor.¹⁸

Shafi'i and Others' Views: According to the viewpoint of the Shafi'i jurists in general, ownership in the estate, with the death of the ancestor, stands transferred to heirs but the debts remain attached with it. According to them, the estate remaining burdened with liabilities of the deceased is no impediment to the right of ownership of the heirs vesting therein, as the property being mortgaged in his lifetime offers no impediment to his right of ownership in that property. Indeed, at the time of payment of debts the creditor's right shall get precedence over the rights of the heirs. A known view of Imam Ahmad b. Hanbal is also in accordance with the same and Shi'ah Imamiya as well agree with this view.¹⁹

Analysis: Islamic law compared to other systems of law is probably unique in keeping the interest and requirements of the deceased in view. It gives him a legal personality and for this purpose considers him legally to be alive. Consequently he is considered judicially to be alive till his obligations are not fully discharged. That is to say, till the time of his burial, the payment of debts due on him, due execution of his will, realization of his realisable assets, and the distribution of his estate among his heirs are not completed, he is considered to be alive. In other words, he is considered to be alive judicially till all acts according to *Shari'ah* regarding

¹⁸Al-Sarakhsi : op. cit., vol. xxix, p. 137.

¹⁹Abu Zahra : op. cit., pp. 25-27.

his estate are not duly performed. The reason is, Islamic law encompasses within it not merely the apparent relationship of one man with another in this world, but also the relationship of man with God in this life as well as in the life hereafter. For instance, the non-payment of debts due on the deceased is a hinderance to his last salvation. His obligation, for example, to payment of debt, therefore, remains his liability even after his death (on his estate), and as long as his obligations remain unfulfilled, he is considered judicially to be alive. The author of *Al-Kifāyah* the commentator of *Al-Hidayah* has remarked "We consider the deceased, for the purposes of the payment of his debts and for executing his Will to be alive and judicially in possession as well as owner of his property".²⁰ The author of *Al-Inayah*²¹ and Ibn 'Ābidin II²² have almost reached the same conclusion. The experts in Principles of Fiqh (Jurisprudence) as well do not consider the juridical personality of the deceased altogether non-existent in as much as the rights and pecuniary liabilities of the deceased do not at once become non-existent. Hence the deceased, inspite of his being dead, is entitled to be assigned those rights which accrued to him during his lifetime. For instance, someone in his life spreads a net and thereafter dies. After his death a game is caught in it. The game shall be the property of the deceased. Or one plants sapling and the same bears fruit after his death. The sapling and the fruit shall be considered to be the properties of the deceased. Likewise pecuniary obligations ensuing in one's life do not lapse merely because of his death. The responsibility of their payment and due performance rest with his estate.

²⁰Mahmūd b. Ubaydullah (d. 745 A.H.): *Al-Kifayah*, Bombay, 1279 A.H., vol. iii, p. 400 :

"ولمّا قدرنا الميت بعد موته حيا و مالكا لاسواله فيما يحتاج الى قضاء دينه و تنفيذ وصيته"

²¹Al-Babarti, Akmaluddin Muhammad b. Mahmud (d. 786 A.H.): *Al-Inayah*, Calcutta, 1830 A.H., vol. iv, p. 137:

"انزلنا الميت حيا في حق بقاء التركة على حكم ملكه فيما اذا كان عليه دين مستغرق و في حق التجهيز و التكفين و تنفيذ الوصايا في الثالث"

²²Ibn Abidin II (d. 1306 A.H.): *Qurratul 'Uyūn al-Akhyār*, Cairo, 1299 A.H., vol. ii, p. 436 :

"الميت يعطى حكم الحي في الاشياء التجهيز و التكفين و قضاء الدين و تنفيذ الوصية"

That is to say, the responsibility is diverted from his person to his estate,²³ if there is one. On this basis the terms of *Huquq al-Mayyit*, (rights of the deceased) and *Dayun 'alal Mayyit* (liabilities againsts the deceased) have always remained in use in Islamic *fiqh*. Thus, the debt due on one's person gets transferred, (because of his death), to his estate. Hence, the creditor's right being attached to the value of the legacy becomes more secure.

As the person on account of his death becomes altogether incapable of paying back his debts, the responsibility of taking care of his interest and of meeting his requirements to the extent of his estate lies with his heirs, just as the responsibility of complying with his rights and duties, during his death-illness, madness, minority and becoming untraceable, gets transferred to his guardian or as the rights of his creditors and of his heirs during his death-illness get attached to his estate, so also happens after the occurrence of his death.

The Holy Qur'an by saying "after the Wills and debts" (IV-11) has given priority to the interests and requirement of the deceased over the rights of heirs. On this basis, the Shafi'is, in case of creditors (and legatees) being present, hold the entire estate of the deceased as "legally mortgaged,"²⁴ which means that even if there is a simple debt against the deceased, his estate (property) shall be presumed to be mortgaged after death, in the eye of *Shari'ah*, to the said debt till it is paid. Accordingly the deferred

²³Abdul Aziz Ibn Ahmad (d. 703 A.H.): *Kashf al-Asrār*, Constantinopal, 1308 A.H., vol. iv, pp. 311-20;

”والدين يتحول من الذمة الى التركة“

Al-Nasafi, Abdullah ibn Ahmad ibn Mahmud (d. 710 A.H.): *Manār al-Anwār*, Constantinopal, 1314 A.H., p. 349;

”والزمة خربت بالموت فان ترك مالا انتقل الدين اليه“

Mulla Khuro, Muhammad ibn Faramurz (d. 885 A.H.) Constantinopal, 1330 A.H., vol. ii, p. 451 :

”لان الدين بالذمة يتعلق بالتركة اذالذمة خربت بالموت“

Muhammad Yusuf Musa, op. cit., p. 72; Abu Zahra, op. cit., p. 29.

²⁴Al-Ramli, Muhammad b. Ahmad (d. 1004): *Nihayat al-Muhtaj*, Cairo, 1292 A.H., vol. iii, p. 395 :

”التركة انما جعلت رهنا بدين الميت نظراً لحاجته ... احوط للميت ان يمتنع على هذا تصرف الوارث فيه جزماً“

debt owned by the deceased because of his death, according to them, also becomes payable at once²⁵ and because of this requirement the estate is considered to be under the constructive ownership of the deceased.²⁶ With the condition of discharging the liabilities due to the death of the deceased, the rights of the heirs get attached with the estate of the deceased.²⁷

Conclusion :

Although Shafi'i jurists do not completely accept the Hanafi doctrine of constructive life, but they do not deny the obligations of the deceased and their discharge. That is why, they put forward the view of legal mortgage. It means that after the expenses of burial ceremonies have been met the entire estate, in case of debts being due on the deceased shall automatically, under law, stand mortgaged in favour of the creditors. As a result whereof the heirs cannot freely make use of their proprietary rights as long as they do not pay off all the debts and dues out of the estate of the deceased. Although the Shafi'i jurists use a different term for it, yet in consequences they appear to be in agreement with the Hanafis, according to whom the real meaning of "debt due from the deceased getting transferred and attached to the estate of the deceased" is that the debt

²⁵Al-Shafi'i, Muhammad Bin Idris (d. 204 A.H.) : *Kitab al-Umm*, Maktaba al-Kulliyāt al-Azhariyyah, Cairo, 1961 A.H., vol. iii, p. 212.

²⁶Al-Sarakhsi : op. cit., vol. xxix, p. 137 :

”ان التركة قبل القسمة مبقاة على ملك الميت“

Mahmud b. Ubaydullah : op. cit., vol. iii, p. 17 :

”حوائجه وقضاء الدين منها ولا يزول ملكه“

Al-Bābarti : op. cit., vol. iii, p. 374 :

”الميت جعل كالمالك حكماً لقيام حاجة الى قضاء ديونه“

²⁷Al-Marghinani, Burhan al-Din (d. 593 A.H.) : *Al-Hidayah*, Karachi, vol. iii, p. 242 :

”حق الورثة يتعلق بالشركة بشرط الفراغ عن الحاجة“

Al-Quhistani, Shamsuddin Muhammad (d. 950 A.H.) : *Jāmi' al-Rumūz*, Kazān, 1898 A.D., vol. iii, p. 455 :

”حق الورثة يتعلق بالتركة الا بعد الفراغ عما يحتاج اليه (الميت)

Al-Shafi'i : *Kitab al-Umm*, op. cit., vol. iv, p. 100 :

”ثم اجماع المسلمين ان لا وصية ولا ميراث الا بعد الدين“

Ibn Nujaym : *Al-Bahr al-Rā'iq*, op. cit., vol. viii, p. 488.

gets attached to the price and value of the estate, not to the real property itself. The term "legal mortgage" which is used by Shafi'i jurists concerning the debt that gets attached to the estate of the deceased is different from the term "particular mortgage". In the case of "particular mortgage" the debt gets directly attached to that property or properties that are settled under that mortgage, whereas in the case of "legal mortgage" there is no such specific settlement. The Shafi'i jurists, in fact, by the use of this term want to make the link between the debt and the estate of the deceased strong. In view of this term used by the Shafi'i jurists the mortgage is held to be of two kinds; One is the "legal mortgage" and the other is the "people's mortgage". The term "legal mortgage" requires that the law in the absence of a person's intention or act ought to recognise the mortgage as existing automatically, whereas in the case of people's mortgage the mortgage is brought into existence by the voluntarily act of the parties (the mortgagor and the mortgagee). As a result, therefore, "legal mortgage" according to the terminology used by the Shafi'i jurists can only be construed to have concern with the *price* and *value* of the estate and not with the *corpus* of the property itself. Hence it is not wrong to say that, in consequence, there is no particular difference between the viewpoint of Hanafis and Shafi'is concerning the debt getting attached to the estate. According to Maliki jurists as well almost same is the case, although they are not openly convinced of "life" of the deceased and according to them no sooner the ancestor dies his heir's proprietary right gets established in his estate, but the heirs can not make use of it till all debts etc. are not paid up. In other words, the heir's proprietary right gets established in the estate since the time of death of the ancestor but they are not entitled to divide it among themselves or sell it as long as the debts are not paid up and the Wills are not put into effect. In accordance with the Maliki and Shafi'i points of view the proprietary right of the heirs, till the payment of debt, appears to be suspended in as much as they are not entitled to make use of it freely. Same is the case according to Hanbali *fiqh* as well.

The rule of conduct of the Shi'ah Imamiyah, on this question, is an ad-mixture of Hanafi and Shafi'i points of view i.e. holding the estate as legally mortgaged. Hence according to them as well the heirs do not become proprietors till the debts etc. are not paid up. They rather carry on management of the property till the debts etc. are not paid up.

Disposition of Estate :

It is now necessary to review the different rules governing the use of the estate by the heirs of the deceased. It is obvious that the estate of the deceased will be (i) either equal to debts and wills; or, (ii) less than the liabilities or, (iii) more than the liabilities.

If the estate is equal to the debt and the Will made, the question of the right of heirs vesting in the estate does not arise *ab initio*.²⁸ The same shall be the situation when the estate of the deceased is not sufficient for the payment of debts and the execution of Wills. However, in the first case i.e. when the property of the deceased is sufficient for the payment of his debts and for putting into effect his Wills, the heirs shall be entitled to make payment of the debts and arrange the execution of the Wills, if any. In the second case, when the property of the deceased is insufficient for the payment of his debts and for the due performance of his Will, the heirs shall have no right of making any utilization of the legacy whether it be for the payment of debts due on the deceased except when creditors' consent is obtained.²⁹ In such a situation, only an officer of the court or an executor (appointed by the deceased) shall have the right of making utilization therein.³⁰ The heirs shall not be entitled to sell, to make compromises or to divide the property among themselves.³¹ If they do so it shall be void,

²⁸Fakhruddin al-Hasan ibn Mansūr : *Fatawa Qāḍī Khan*, m.o. *Fatawa Alamgiri*, Cairo, 1323 A.H., p. 558 :

”التركة مستغرقة بالدين حتى لا يبقى للوارث بعد الدين“

Al-Marghinani : op. cit., (Kitab al-Sulḥ), op. cit., vol. iii, p. 257, (marginal note) :

”ان الدين يمنع وقوع الملك للوارث“

²⁹Al-Sarakhsi : op. cit., vol. xv, p. 59 :

”اذا كان الدين مستغرقا للتركة فلان الورثة لا يملكون التركة ولا ينفذ تصرفهم فيها“

³⁰Ibn Nujaym : op. cit., vol. vii, p. 52, (*Masā'il Shatta*) :

”لان ولاية البيع للقاضي اذا كانت التركة قد احاط بها الدين ولا يملك الوارث البيع“

³¹Al-Marghinani : op. cit., vol. iii, p. 157, (Kitab al-Sulḥ) :

”وان كان على الميت دين مستغرق لم يجوز الصالح ولا القسمة لان التركة لم يتملكها الوارث“

Qāḍī Samawah, Mahmūd b. Isrā'il (d. 823 A.H.) : *Jāmi' al-Fuṣulayn*, Matba' Bulḡq, Cairo, 1300 A.H., vol. ii, p. 23 :

”لو على الميت دين مستغرق لم يجوز الصالح ولا القسمة ذ وارثه لم يتملك تركته“

in as much as they are not *ab initio* the proprietors of that property.³² Indeed, the creditors shall have the right, if they so desire, to refuse the disposal of the estate by the heirs totally or accept such disposal as valid. In the latter case, if the disposal is at the correct market value the creditors shall be entitled to realise that value from the heir. If the heir does not pay the consideration obtained to the creditors they shall be entitled to demand it from the purchaser, and the purchaser shall be bound to pay the same to the creditors.³³ In such an event, the purchaser has a right against the heir (the seller) of making reimbursed his loss. It is like an unauthorised sale, in as much as the heir sold a property over which he had no proprietary right, nor had he the right of making utilization therein and the right of the creditors had duly vested in the estate. On the other hand, if the heirs so desire they have the right of redeeming the entire property after payment of the entire debt and thus may become the proprietors of the property. If the heirs so act, the creditors are bound to accept the payment of the debt. They cannot claim a particular property out of the estate because the right of realisation of debt, in fact, covers the whole estate of the deceased and not any particular property out of the estate. It is, however, obligatory in such an event that the heirs pay the entire debt. Their paying in proportion to the value of a particular property out of the estate shall not be sufficient, (if more than one properties are mortgaged with one creditor in one coverent).

If the estate is more than the liabilities, that is, after the payment of debt and execution of Will there remains some part of the estate to which the heirs are held entitled, in such a case there are two points of view regarding the rights of the heirs:—

1. The first point of view on the basis of *Qiyās* is, that the heirs cannot be held to be entitled to the estate as long as the entire debt is not paid up and the Wills are not put into effect, in as much as the debts or the Wills are not concerned with any particular property or with particular (separate) parts of the estate; rather they cover the entire estate. As the obligations of the deceased (the debts and the Will) are in existence, the deceased,

³²Ibn Nujaym : op. cit., vol. vii, p. 262.

³³Ibn Abidin : *Radd al-Muhtār*, Constantinopal, 1294 A.H., vol. iv, p. 527 :

”بيعة الوارث متوقف على رضا الغرماء“

therefore, shall be considered to be legally alive till their discharge and the heirs shall be entitled to make utilization of the estate only after meeting the obligations of the deceased. The heirs, therefore, can neither sell it, nor can they divide or settle it among themselves, till the entire debt due on the deceased is paid up and his Will is put into effect.

2. The second point of view on the basis of *istihsān* is, that although the correct basis of the rights of the heirs is an estate unencumbered with obligations to others, but if the debt is so meagre that a portion of the estate can easily be set apart for it, the remainder can be distributed among the heirs. This shall be even in the interest of the deceased, in as much as the heirs themselves shall now be responsible for the waste (if any) of the property. Thus, the heirs shall not be entitled to become proprietor of that part of the estate which is encumbered with debt, nor can they make utilization to that extent, but they shall be entitled to make utilization of its unencumbered part.

Majority of jurists appear to be in support of the view that the characteristic of the debts that are to be paid from the estate of the deceased is akin to the debts attached to a mortgaged property. As the mortgagor, inspite of being the proprietor of the mortgaged property, cannot pass a clear, valid and absolute title in the property already mortgaged, the heirs as well cannot sell it. Inded, if the estate is more than sufficient, in that case, after making suitable arrangement for the payment of debts, there remains no risk of loss to creditors on account of making proprietary utilizations by the heirs of the remaining estate and at the same time the obligations etc. of the deceased are duly discharged. Hence, according to them, there is no difficulty in the distribution of the remaining estate.

Author's View :

The viewpoint of this writer as well is in the agreement with this view. The intent of the Qur'ānic dictate is clearly to put into effect the process of division of shares among the heirs only after the discharge of the debts and execution of the Will of the deceased, if any. The making of distribution of estate among the heirs subsequent to the payment of debts and the execution of Will means that the rights of the creditors are not to be put under

³⁴Sh. Nizamuddin, *Fatawa Alamgiri*, Calcutta, 1843.

jeopardy. If a portion of the estate equal to the debt is set apart and the remaining estate is divided among the heirs, the rights of the creditors are not put to the risk of being adversely affected, provided the entire debt is really paid off.

In case the estate exceeds the debt and the heirs divide the legacy among themselves and thereafter it is ascertained that there is another debt against the deceased the new creditor in that case shall have the right of getting the division or the sale of the estate declared as void except where the debt is paid off.³⁵

The period for the institution of such a claim under Egyptian Law has been fixed as three years after the death of the ancestor. Same is the period prescribed under Article 9 to the Limitation Act in Pakistan. There seems to be nothing objectionable under Shari'at in fixing a time-limit to such claim because it will not be in public interest to keep and remain the estate open for an indefinite period of time. However, this does not mean that the right has lapsed by prescription.^{35a} Nevertheless, the liability of the debtor to his creditor shall remain intact for which he shall be answerable in the next world. It may, however, be suggested that the period of three years be enhanced.

Conclusion :

It is abundantly clear from the above discussion that though the heirs, in case of the estate being more than the debt, are considered to be the proprietors of the estate, they do not get absolute title in it. That is why, they can not transfer their title to others except when the entire debt is paid off. Thus the debt as long as it is unpaid (whether the heirs are aware of it or not) the purchaser cannot get a clear and absolute title from the heirs (sellers) and the creditors shall have the right of getting the sale annulled.

The rights that the creditors had against the person of the deceased in his life, after his death, become attached to the value of the property left by him. The property as a whole, without any specification, is considered under law to be mortgaged under the creditor's debts. The viewpoint of Shafi'i and Shi'ah jurists has, in its scope, greater safeguards in the interest of the creditors in as much as the transfer of the property by the heirs in favour of another, prior to the payment of debts, shall be void. Whereas the Hanafi and Maliki jurists hold such sale to be valid, provided the debts are paid off. The difference between the two points of view, in consequence,

³⁵Qadi Samawah : op. cit., vol. ii, pp. 23-24.

^{35a} لا يسهط الحق بالتقادم (المجلة)

is the difference between transactions as void and voidable. The viewpoint of Hanafis appears more alive to public policy and expediencies. In this respect there is a basic difference between the Islamic law of transfer of property and the Western law. If a person acquires the estate of the deceased from his heirs through sale for consideration, when the debts of the deceased are not paid off, the purchaser under the Islamic law cannot acquire absolute title to the property. The creditors can get such sale annulled. It makes no difference whether the heir was or was not aware of the debt or the purchaser purchased the property for value without notice and in good faith. The reason is that the heir himself having no absolute ownership cannot transfer to another an absolute ownership except when all debts are paid off. This rule is based on the principle of "No inheritance before payment of debt" which is established by the mandate in the Qur'an (IV : 11). This is so because the rights of others that are due against the deceased may be discharged first, and the soul of the deceased may be delivered from torments he may receive for undischarged debt in the world hereafter. Under the Western law of transfer of property the right of a transferee for value without notice and in good faith shall not be affected, as is evident from the transfer of Property Act, 1881.

Principle of bonafide purchase :

The only question that remains is of a purchaser who has acquired the property in good faith. How can a creditor, because of his debt being unpaid, get that sale set aside? The purchaser for value in good faith under the Western law, has some safeguards. But Islamic law in this connection takes a contrary view that the legal consequence of an act which is concerned with a right cannot be altered on account of knowledge or the absence of knowledge. Secondly, prior to the right of purchaser, the right of creditor gets created in (the value of) the estate. Hence, inspite of good faith and lack of knowledge, the creditor has the right of getting the sale annulled except when his debt due on the deceased has been paid up. As under Islamic law compulsory management of estate through court is not provided for protection of creditor's rights, inheritance has been placed subsequent to the debt and the Will in the order of execution, and the payment of debt has been stressed upon for salvation of the deceased.

Suggestion :

As the general ethical conditions of the Muslim society at present is at its lowest ebb, it shall not be out of place to mention here that though the Islamic law has given enough protection to the creditors but they are, in view of the social conditions and the present frame-work of the courts,

to a great, extent under many handicaps. Hence it shall be proper to frame legally permissible rules regarding the compulsory management of the estate. That is to say, the heirs should legally be bound that they, after the performance of funeral rites and ceremonies, shall inform the court, within a fixed period, of the details of all belongings, properites, debts and Wills of the deceased and the court should get performed all the lawful acts, things and deeds under its own supervision so that no one be deprived of his rights. Especially the creditors should be made safe from the manoeuvrings of the heirs (so that the deceased himself may get salvation in the next world). In fact, the present Law regarding the voluntary management of estate has proved to be not merely insufficient but is also devoid of proper force to protect the creditors' rights in as much as the latter remain ignorant of the death of the ancestor, of the names and addresses of the heirs and of the details of the estate. This is the situation that one is generally faced within big commercial cities which is an inevitable result of the present industrial age.

Judicial Viewpoint :

Examining, in the light of the above discussion, the decisions³⁶ of the superior courts of Indo-Pak sub-continent on this question, it seems that in connection with the payment of debts, the condition of estate prior to its division and the rights of heirs attached to it, the principles of English law have been generally followed by our courts; and these principles without any deliberate attempt on the part of our courts imperceptably began to be regarded as part of the Islamic law of inheritance and succession. Thus, under the Anglo-Muhammadan law that came into existence, on the basis of these decisions, the view that the deceased be held legally alive became an alien concept.

Justice Mahmud, probably the first and most famous of Muslim judges of undivided India, held in the case of "*Jafri Begum versus Amir Mohammad Khan* [(1885) All. 822,] that estate on the death of a Muslim gets at once transferred in favour of his heirs. The inheritance does not remain suspended merely on the ground that debts are to be paid up out of the estate of the deceased. Thus, according to his view, the existence of debts, big or small, becomes altogether irrelevant. In fact, Justice Mahmud was influenced by the Privy Council's judgement passed in the case of

³⁶*Assamathem Nasaa Bibi vs. Roy Latchmooput Singh* (1878) 4, Cal. 142; *Jafri Begum vs. Amir Mohammad Khan* (1885) 7, All. 822; *Khursheed Bibi vs. Kesso Vinayak* (1887) 12 Bom. 101; *Darvalara vs. Bhimajje Bhond* (1885) 20, Bom. 335; *Pathammabi vs. Vittel Ummachabi* (1902) 26 Mad 734.

"Bazayet Hossein versus Dooli Chand"³⁷ that an heir had the right to convey his own share of the inheritance and was able to pass a good title to the alienee notwithstanding any debts which might be due from his deceased father. This judgment of the Privy Council is based on the case of "Wahidunnisa versus Shabratan"³⁸ which is also in conformity with the English law. Most of the decisions in the High Courts of undivided India have been given in accordance with the same principle,³⁹

The Privy Council in another case, "Jan Mohammad versus Karam Chand" held that one of the several heirs of a deceased Mohammadan, though he may be in possession of the whole estate of the deceased, has no power to alienate the shares of his co-heirs, not even for the purpose of discharging of the debts of the deceased. If he sells any property in his possession forming part of the estate of the deceased though it may be for the payment of the debts of the deceased, such sale operates as transfer only of his interest in the property. It is not binding on the other heirs or the other creditors of the deceased. The reason being that the estate of a Muhammadan dying intestate devolves on his heirs at the moment of his death and his heirs take their shares in severalty, their rights being analogous to "tenants in common" and not members of a joint Hindu family."⁴⁰

Mr. Justice A. R. Cornelius, former Chief Justice of Pakistan, as a Judge of Lahore High Court, as he then was, in the case of "Mahbub Alam versus Razia Begum" observed "The Holy Qur'an places great stress upon the payment of debts and legacies before the estate is divided among the heirs at will. The question whether or not the concept of representation of the deceased person, or of the deceased person's estate, is foreign to Muslim law is hardly relevant". Justice M. R. Kayani in the same case held: "the distribution of the residue among the successors of a deceased person is a duty attached to the estate notwithstanding that it vests in the heirs of the

³⁷Bazayet vs. Doolichand (1887) 51, All. 211.

³⁸Waheedunnisa vs. Shubraton (1870) Bengal Law Report, p. 54.

³⁹Awais vs. Harshabai (1885) ILR All. 716; Dallumal vs. Hari Da (1901) ILR 23 All. 263; Campbell vs. Delancy 1863 Rep., p. 509; Abdul Kadir vs. Chindambaram Chattiya (1908) 32, Mad. 276; Abdul Majeed vs. Krishna Machariar (1917) 40, Mad. 243; Bhagarerthi Raj vs. Roshan Bai (1918) 43, Bom. 412; Kazim Ali vs. Sadiq Ali (1938) 65, I. A. 219; Bilandi Sbini vs. Begum Noor AIR 1943, Peshawar 62; Faizullah Khan vs. Abdul Jabbar AIR 1934, Peshawar 65.

⁴⁰AIR 1953 SC 2981; PLD 1947 Privy Council 62; AIR 1918, Madras 1049.

time of the death of the *propositus*. The theory that the property of a deceased Muslim vests in his heirs immediately after his death is considerably tempered by the injunction that the heir is entitled only to the residue after the payment of a legacy or debt."⁴¹

The courts of Indo-Pak sub-continent have held that if the estate prior to its division is in possession of an heir a decree for the entire debt can be obtained against him.⁴² But after division of the estate, among the heirs, the liability of the payment of debt due on the deceased rests upon each heir to the extent of his share.⁴³ For instance, the estate consists of rupees one lac and the debt is rupees twenty thousand. The deceased leaves behind him a son and two daughters. The heirs without paying the debt divide the estate between them. The son gets rupees fifty thousand and the daughters get rupees twenty five thousand each. The creditor for realising his debt of rupees twenty thousand (Rs. 20,000/00) institutes a suit in the court. Due to ignorance of the names and addresses of other heirs, the suit is instituted only against the son. The court in the case passes against him a decree of half the debt i.e. of rupees ten thousand (Rs. 10,000/-), because he inherited only the half of the entire estate. It holds that the creditor for the rest half of the debt ought to have instituted the suit against the two daughters or he ought to have made all of them as parties to the suit. It is, thus, necessary for a creditor to make all the heirs parties to the suit. If he does not do so, the court will not pass a decree against the heir who is not a party to the suit.⁴⁴ On the contrary the heir is responsible, under Hanafi *fiqh*, to pay the debt to the extent of the value of the estate that he has inherited. Thus, if only one heir has inherited so much of the estate that is sufficient for the amount claimed by the creditor, it is not necessary for the creditor to pursue each of the heirs. The son, in the above-stated case, has inherited rupees fifty thousand whereas the entire debt due on the deceased is rupees twenty thousand. According to Hanafi *fiqh*, a decree for the payment of rupees twenty thousand from the estate received by the son shall be passed against him in as much as the payment of the debt is required through the estate that the heir inherited from the deceased who actually owes the amount. The son, however, shall have the right, after having paid the debt, to realise

⁴¹PLD 1949, Lahore 263; ILR 45, Bombay 75; ILR 7, Allahabad 822; AIR 1938, Privy Council 1969; ILR 45, Bombay 75; AIR 1928, Madras 769; ILR 39, Bombay 545; 28 Indian Cases 895; 41, Indian Cases 579; AIR 1942 Lahore 65; AIR 1940, Lahore 179.

⁴²AIR 1933, Lahore 81; ILR 1917, Mad.

⁴³ILR 4, All. 361; AIR 1932, All. 591.

⁴⁴Qadi Samawah : *op. cit.*, vol. ii, pp. 23-24.

the amount from other heirs in proportion to their shares, or claim the joining of other heirs to the suit so that a decree, if passed, may be executed against all the heirs who are parties to the suit.

Indeed, according to Shafi'i *fiqh*, each heir is responsible to pay up the debt in proportion to his share when the estate has been divided between them⁴⁵ but the creditor's remedy lies against the estate and not against the heirs personally. Thus the Hanafi view appears to be just and sound.

Conclusion : To sum up, the trend of courts of Indo-Pak sub-continent appears to be that if an heir transfers his share in the estate without payment of debts, his act of alienation shall be valid and the title of a bonafide purchaser shall not be affected. This principle has been adopted without exception whether the debt is more or less than the estate. But if the debt is more than or equal to the estate, the principle appears to be not only against the *Shari'ah* but also against the basic norms of justice. This not only violates the Qur'anic directive, but also affects the rights of the creditors. In the light of correct enunciation of Islamic law the division of the estate or its alienation can only be valid after the payment of debts and carrying out of the Will into effect especially when the debts are more than the estate. The suggestion of compulsory administration of estate that has been made above has within it the capability of preventing to a great extent this state of affairs. The current law as in force in Pakistan does not meet the present social requirements.

Will :

A "Will" is taken to be a third right to be considered during arrangements concerning the estate of the deceased. After the payment of debts it can be put into effect to the extent of one-third from the estate left over as residue (not from the entire estate of the deceased). In case of "Will" being for more than one-third of the estate it shall be put into effect only if the heirs give their consent. The consent of only those heirs shall be valid who are legally capable of giving consent i.e. they are prudent and major. The consent of a minor or his guardian is not valid.⁴⁶ Besides, the consent must have been given after the death of the deceased. The jurists have divided the Will into two kinds as under:—

⁴⁵Abu Zahra : op. cit. p. 32 :

”اما على نظرية الشافعية فانه تصح القسمة“ و يصح على قول بعضهم تصرف كل وارث في حصته قبل القسمة اذا ادى ما عليها من دين ان مذهب الشافعية يسوغ تجزئة الضمان بمقدار حصص الوارثين“

⁴⁶Ibn Nujaym : op. cit , vol. viii, p. 489; Al-Haskafi : op. cit., vol. v, p. 464.

1. Specific Will.

2. General Will.

Specific Will : Specific Will means a Will made regarding a particular property.

General Will : General Will means the Will made regarding no particular property. God has given priority to Will over inheritance (IV : II).

In the Qur'anic verse, the word "wasiyyat" has been used as absolute indefinite noun which connotes both particular as well as general Will. Hence all kinds of Wills whether particular or general shall have priority over inheritance. Thus, after the expenses of funeral ceremonies and payment of debts, all kinds of Wills, according to law, will be acted upon, within the limit of one-third of the estate, and, thereafter, whatever is left over will be divided among the heirs, because Allah has mentioned the heirs and their shares after debt and Will.

Will when no heirs :

The Hanafis are agreed on the point that if there is no heir entitled to estate then after the payment of debt, if any, due on the deceased, the Will shall be put into effect from the estate of whatever quantity may it be. This is so because Will, in such a situation, does not affect the rights of any heir. Hence, there would be no hinderance to its being put into effect. On this question Imam Malik and Imam Awza'i hold that Will regarding more than one-third of the estate is void. Same is the rule of conduct of Imam Shafi'i also. But, on this point, two conflicting views are reported from Imam Ahmed Bin Hanbal that holding such Will being invalid, is weak⁴⁷.

⁴⁷Al-Jurjani : *Al-Sharifiyyah*, Karachi, p. 11;

Ibn Rushd (d. 595 A.H.) : *Bidayatul Mujtahid*, Cairo, vol. ii, p. 336, (*Kitab al-Wasaya*).

”واما اختلافهم في جواز الوصية باكثر من الثلث لمن لاوارث له فان مالكا قال لايجوز ذالك والاوزاعي اختلف فيه قول احمد، واجاز ذالك ابو حنيفة واسحاق و هو قول ابن مسعود“

Al-Firozabadi : op. cit., vol. i, p. 457, (*Kitab al-Wasayah*)

”واما اذا اوصى بما زاد على الثلث فان لم يكن له وارث بطلت الوصية فيما زاد على الثلث لان ماله ميراث للمسلمين ولا مخرج له منهم“

Shaykh Abu Zahra a famous scholar of Egypt (d. 1974 A.D.) has stated in his book, *Ahkam al-Tarkat*, p. 110, that there is a consensus of opinion of the four Imams on this question. In view of the above citations of the Maliki and Shafi'i schools of law, the statement of Shaykh Abu Zahra appears to be incorrect.

The basis of this difference among the jurists is that, according to Imam Abu Hanifah, the limit of one-third placed on a Will's validity by the tradition narrated by Ibn Abi waqqās, is due to the expedience that the heirs may not go begging for the fulfilment of their needs before others. But where there is no heir, there is no valid reason for complying with the limit of one-third. There is, therefore, no hinderance in the right of a legatee to get the entire legacy, if so Willed by the deceased. On the other hand the argument of Imams Malik and Shafi'i is that Will is a divine virtuous act, the limit whereof is fixed as its main ingredient or integral part. Therefore, if the heirs of the deceased do not exist the entire Muslim community shall be deemed to be heirs of the deceased. Likewise, there is difference among the jurists whether or not a Will made regarding more than one-third, where the heir is alive, is valid. According to the Hanafis and the Hanbalis the Will to the extent of one-third shall be absolutely valid and in the event of its being of more than one-third it shall be put into effect (to the extent it exceeds the limit), after obtaining consent of the heirs. According to the Shafi'is and some of the Malikis, the Will regarding more than one-third shall be considered to be their own act of beneficence. It shall not be considered as a Will of the deceased.⁴⁸

The reason of this difference between the Hanafis and Hanbalis on the one hand and Shafi'is and some of the Malikis on the other is that the former do not hold the presence of heirs to be a hinderance in the Will in its inception but to its effect to the extent it exceeds the prescribed limit of one-third. As against them, the latter hold the presence of heirs to be a bar to the very validity of the Will itself in its inception when it is made regarding more than one-third of the estate.

The basis of this difference of opinion is the tradition reported by Sa'd Ibn Abi Waqqas. According to Hanafis and Hanbalis the execution of a Will for more than one-third has been prohibited through this tradition; whereas the Shafi'is and Malikis, in view of the literal meaning of the said tradition, do not consider a Will that has been made for more than one-third in presence of the heirs to be valid at all. That is to say the latter, in the said circumstances, negated the very existence of Will, whereas the Hanafis and the Hanbalis held the presence of heirs, in case of Will being for more than one-third, to be a hinderance in the taking effect of the Will. According to this writer, the view of the Hanafis and Hanbalis appears to be correct. Thus the Will, even in case of being for more than one-third,

⁴⁸Abul Barkāt : op. cit., vol. i, p. 376; Al-Firozabadi : op. cit., vol. i, p. 457; Al-Abi, Abdul Sami, *Jawāhar al-Aklīl* (Commentary on *Mukhtaṣar al-Khalīl*), Matba' Mustafa Al-Babi, Cairo, 1947 A.D., vol. ii, p. 318.

shall not be void and ineffective; rather it shall be held to be effective to the extent of one-third and where the heirs give their consent to the part which is more than one-third, the Will in respect of that part shall also be executed.

The limit of Will :

Several narratives are found in the books of Traditions regarding the limit of one-third of legacy (after the expenses of funeral rites and the payment of debts) prescribed by the Holy Prophet for Wills. Thus it is in the "*Sahihain*" (*Bukhari and Muslim*) that Haḍrat Sa'd Ibn Abi Waqqās said "O Prophet of God! I am rich and I have only one daughter as my heir. Permit me that I make the Will of my entire property". The Prophet said, "No". He said, "May I make a Will for two-third of my property?" The Prophet said, "No". Sa'd said, "Give me permission for one-third". The Prophet said, "All right, make a Will for one-third of the property, though this as well is much. You leave your heirs behind you in affluence. This is better than you leave them beggars and in poverty and others maintaining them."⁴⁹

It is in "*Sahih al-Bukhari*" that Ibn Abbas said, "Would that the people change over from 'one-third' to 'one-fourth' as the Prophet, while permitting one-third, said, "It is much".⁵⁰

⁴⁹Imam Muslim, Abul Hasan (d. 261 A.H.): *Ṣaḥīḥ Muslim*, (with commentary by Nawawi), Al-Matba' al-Misriyyah, Cairo, 1924 A.D. pt. 11, pp. 76-82 :

"حدثنا يحيى بن يحيى التميمي اخبرنا ابراهيم بن سعد عن ابن شهاب عن عامر بن سعد عن ابيه قال عاذني رسول الله صلى الله عليه وسلم في حجة الوداع من وجع اشفيت منه على الموت فقلت يا رسول الله بلغني ماترى من الوجع و انى ذومال ولا يرثنى الا بنتى افا تصدق بثلاثى مالى قل لا قلت افا تصدق بشطره قال لا قلت الثالث قال الثالث و الثالث كثير انك ان تذر ورثتك اغنياء خير من ان تزرهم عالة يتكففون الناس . الخ "

Imam Bukhari, Muhammad b. Isma'il (d. 256 A.H.): *Ṣaḥīḥ al-Bukhārī*, Karachi, 1381 A.H., 1961 A.D., vol. i, p. 383 :

"حدثنا ابو نعيم ثنا سفيان عن سعد بن ابراهيم عن عامر بن سعد بن ابي وقص قال جاء النسي صلى الله عليه وسلم يعوذنى وانا بمكة وهو يكره ان يموت بالارض التى هاجر منها فقال يرحم الله ابن عفرأ قلت يا رسول الله اوصى بمالى كله قال لا قلت الشطر قال لا قلت فالثلث قال الثلث والثلث كثير انك ان تدع ورثتك اغنياء خير من ان تدعهم عالة يتكففون الناس فى ايديهم الخ "

⁵⁰Imam Bukhari : op. cit., vol. i, p. 383 :

"حدثنا قتيبة بن سعيد ثنا سفيان عن هشام بن عروة عن ابيه عن ابن عباس قال لو غرض الناس الى اربع لان رسول الله صلى الله عليه وسلم قال الثلث والثلث كبير او كثير "

(Contd. on next page)

Hadrat Ali remarked "I have greater regard for the person who makes a Will regarding 'one-fourth' compared to 'one-third', and 'one-fifth' compared to 'one-fourth'. There are similar reports from Haḍrat Abu Bakr and Haḍrat 'Umar'.⁵¹

Will in favour of heir :

The relevant Qur'anic verse revealed in connection with the Will in question reads thus:

It is prescribed when death approaches any of you, if he leave any goods, that he make bequest to parents and next of kins, according to reasonable usage. This is due from the God-fearing (Surah Al-Baqarah, II : 180).

The meaning of the word *khair* :

The commentators have taken the meaning of the word '*Khair*' occurring in the above stated verse to be 'property'. According to the views of Haḍrat 'Ali and Haḍrat 'Āishah, the meaning of '*Khair*' is "large property", so that the heirs may not be deprived of their rights. Same is the opinion of Imam Zuhri. The verse of the Qur'an thus means that if the property is large, the Will may be made in favour of non-heir relatives, orphans and the poor ones.

Opinions of Commentators :

The commentators of the Holy Qur'ān, in general, have said that the directive regarding a Will was promulgated at the inception of Islam, which was repealed by the verse relating to inheritance : (Al-Nisā, IV : 11). This repeal is explained by the Prophet's tradition that "God has given to every entitled ones his right. There is now no Will for the heirs".⁵²

(Contd. from page 450)

Imam Muslim : op. cit., pt. 11, p. 82 :

"حدثني ابراهيم ابن موسى الرازي اخبرنا عيسى (يعنى ابن يونس) وحدثنا ابو بكر بن ابي شيبة و ابو كريب قالوا حدثنا وكيع و حدثنا ابو كريب حدثنا ابن نمير كلهم عن هشام ابن عروة عن ابيه عن ابن عباس قال لو ان الناس غضوا من الثلث الى الربع فان رسول الله صلى الله عليه وسلم قال الثلث و الثلث كثير"

⁵¹Al-Sharakhshi : op. cit., vol. xxvii, p. 144.

"ان الله قد اعطى كل ذى حق حقه الا لوصية لوارث"

(ابو داؤد، ابن ماجه ترمذى، نسائى) - ⁵²

Zamakhshari's opinion: The author of the Tafsir "Al-Kashshaf,"⁵³ Allama Zamakhshari quoting the above mentioned tradition has said, "Although this tradition is reported by a single narrator yet all the Jurists of the Ummah have accepted it, wherefore this has attained the degree of a "universal tradition". The Jurists-Companions of the Holy Prophet and their Successors shall accept a tradition unanimously only when, according to them, it attains the extreme degree of accuracy. This tradition, therefore, may be taken as abrogating the verse relating to Will. (11 : 180).

Baidāwi's View: Allama Baidāwi has said, "I have objection regarding the abrogation of the verse respecting Will through this tradition (Note 52). This tradition is of the single narrator's classification and the single report tradition raises (merely) a presumption and so cannot abrogate explicitly any verse of the Qur'ān. For abrogation it is essential that the abrogating text must either be more authentic than the abrogated one or at least be equal in degree and the single report tradition has no such force. The Qur'ānic verse is absolutely authentic whereas the single report tradition is only a presumption".

Allama Baidāwi further writes, "The verse respecting inheritance is not contrary to the verse respecting Will, in as much as the verse respecting inheritance proves the priority of Will." (i.e. after putting the "Will" into effect the inheritance shall be given effect to). Baidāwi (probably answering Kashshāf) continues to say, "A single report tradition because of its being accepted by Ummah does not attain the degree of "universal tradition"; at best it attains the degree of a "known report" which is lesser in degree than a universal tradition".⁵⁴

Opinion of 'Allama ibn Kathīr: Allama Ibn Kathīr in his *Tafsīr*, on this question, writes that in this verse (II : 180), the directive is regarding the "Will" in favour of mother, father and relatives, This directive was imperative prior to the ordinance regarding inheritance. The directive regarding inheritance has abrogated the directive regarding "Will". Abdullah Ibn 'Umar, Abu Musa al-Aash'ari, Sa'id b. Al-Musayyib, Hasan, Mujahid, Ata, Sa'id b. Jubair, Muhammad b. Sirin, 'Ikramah, Zaid b. Aslam, Rabi'b. Anas, Qatadah, Suddi, Maqātil b. Hayān, Tā'us, Ibrahim, Nakh'i, Shuraih, Zuhak and Zuhri all these persons as well maintain the verse relating to "Will" as abrogated in terms of its being acted as an ordinance. Ibn

⁵³Al-Zamakhshari, Mahmud b. Umar (d. 528 A.H.): *Tafsir al-Kashshāf* Beirut, vol. i, pp. 223-224.

⁵⁴Al-Baidāwi, Abdullah ibn Umar (d. 791 A.H.): *Tafsīr Baidāwi*, Matba' Mustafa al-Babi, Cairo, 1358 A.H., 1939 A.D., vol. i, p. 89.

Kathir further writes that some of the commentators of the Holy Qur'an and Jurists maintain that the directive regarding Will in favour of heirs is abrogated but it stands intact in favour of non-heirs. Same is the rule of conduct approved by Ibn Abbas, Hasan, Masruq, Ta'us, Zuhak, Muslim b. Yasār and 'Alā' Bin Ziyād. On the basis of the view of these persons the verse regarding Will does not stand abrogated, as termed by later Jurists because through the later verse relating to inheritance the same persons have been particularised by directive and God Himself had so fixed their shares. The same persons previously through the directive under the verse regarding Will were included in the Will in as much as the word "relatives" is general. All the relatives are included therein whether their share is fixed or not. Thus, the directive regarding Will remained in force concerning those relatives who were not heirs and did not remain in force concerning those who were heirs. Hence to say that the directive regarding Will was in vogue in the early days of Islam is redundant. Indeed, the making of Will in favour of parents and heirs stands prohibited. The directive under the verse relating to inheritance is established and that being obligatory has been made incumbent by God. Consequently the directive under the verse regarding "Will" becomes unenforceable and only the making of "Will" to the extent of one-third in favour of non-heir relatives remains supererogatory.⁵⁵

Khazan's View : Allama 'Ala'uddin Ali b. Muhammed, author of Tafsir Khāzin has said that the people in the days of ignorance made Wills in favour of (distant) relatives for pride and glory and left behind their close relatives in want and poverty. God, therefore, made it obligatory that Wills be made in favour of relatives. This verse, thereafter, was abrogated by the verse relating to inheritance.⁵⁶

Imam Razi's discourse : Imam Razi, of the learned commentators, has discussed elaborately the question of "Will in favour of heirs". He writes : "Ulama have differed regarding the verse about "Will"; one group maintains that making Will for parents and relatives is desirable and the other group is convinced of its being obligatory. Their argument, based on the words "كنب" (directed) and "عليكم" (on you) of the said verse, is that these two (Arabic) words provide proof of its being obligatory. Besides, God has emphasised its being obligatory at the end of the verse by saying "حقاً على العتقين" (i.e. This is due from the God-fearing). But there is a

⁵⁵ Ibn Kathir, Isma'il b. Umar (d. 774 A.H.) : *Tafsīr Ibn Kathīr*, (Urdu Tr.), Karachi, vol. i, pp. 29-30.

⁵⁶ Alauddin Ali b. Muhammad (d. 725 A.H.) : *Tafsīr al-Kazan*, Matba' Mustafa al-Babi, Cairo, 1375 A.H., 1955 A.D., vol. i, pp. 148-149.

difference of opinion among those who are convinced of its being obligatory, whether this verse has been abrogated or not" ?

Argument against abrogation: Referring to Abu Muslim Isfahani, Imam Razi discusses his view in several ways as under:—

1. The first premise of argument is that the verses relating to Will and Inheritance are not inconsistent, rather both the verses (in their directives) are so interconnected as if God says, "As God has made Will for you regarding your parents and relatives so it has been made incumbent upon you as well to make Will (regarding others). (That is, both the Wills in their respective capacities be compulsorily acted upon). Or it is meant that when the time of death approaches, it is incumbent upon a person to make a Will of the appointed shares as fixed by God in favour of the person mentioned in the verses and to make no reduction in its quantum and shares.
2. The other premise of argument is that there is no contradiction in getting one's share and the legacy either by way of inheritance and by way of Will. The legacy (under Will) is a gift by the deceased and the share by inheritance is from God. Both these gifts, therefore, have been made to coincide so far as the heirs are concerned and the behests under both the verses do subsist.
3. The third premise of argument is: If it is supposed that there is a contradiction between both the verses it can be reconciled by holding that the verse relating to inheritance particularizes the verse relating to Will, not that it abrogates. Hence its meaning shall now be that the verse relating to Will is common for both the parents and all the relatives. The verse relating to inheritance excludes those relatives from Will who are heirs. Indeed those relatives shall as of old remain included in the Will who inspite of being relatives are not heirs. The reason for this is that the parents of the deceased may find themselves in one of the two possible situations. One is that they are heirs and the other is that they are not the heirs, (for example, where the heir differs in religion from his ancestor or the heir has committed murder of the ancestor and thus depriving himself from inheriting the property of his ancestor). Again, there are some such heirs who, on account of there being some other heirs nearer in degree of relationship, are excluded, and there are some that cannot be excluded, or get excluded when there exist heirs higher in degree than themselves and some stand excluded on account of their

status of being distant kindred. Thus, whoever is found to be the heir, a Will made in his favour shall not be valid. It shall be valid where he is not the heir.

Argument for Abrogation : Imam Rāzi further writes, “Some persons maintain that the verse relating to “Will” stands abrogated. Regarding this view the first question arises, what is the proof of the verse of “Will” being abrogated. They differ regarding the answer. In this connection they advance a number of arguments:—

1. The first argument is that God Himself has fixed the shares of the heirs in the estate of the deceased and has given to each of the entitled ones his right and that's all.

But this argument is not understandable, because it is not prohibited that a person for whom a share is fixed through inheritance may not be given further share through Will. At best it may be said that the verse relating to Inheritance creates certain particularisation in the verse of Will, not that the same abrogates it. For instance, if it is said that in the event of the deceased not leaving any heir except his parents his entire estate shall devolve upon them through inheritance, leaving nothing for the purpose of a Will. This shall be called particularisation (under the verse of inheritance) and not abrogation (of the verse about Wills).

2. The second argument runs thus : The verse about Wills be held abrogated by the Prophet's tradition that there is no “Will” in favour of an heir. This assertion appears to be acceptable but the difficulty is that it is a *Khabr Wāḥid* (Single report) and the abrogation of a Qur'ānic verse by *Khabr Wāḥid* is not valid. The answer to this difficulty, as given, is that this tradition though is a *Khabr Wāḥid* but has continuously been accepted by jurists. It has, thus, obtained the degree of continuity (*tawātur*) by consensus. But an objector may maintain that the Jurists could have either accepted this tradition as presumptive or as final. If it is held as presumptive, in that case, it shall have to be taken into account that there is a unanimity of the jurists on the point that the tradition is *Khabr Wāḥid*. Hence abrogation of a verse of the Qur'ān through an isolated report is not valid. If the tradition is held to be as final (in its proof) and there is a consensus on it, then it is unacceptable because, inspite of this tradition being an “isolated” one, its acceptance as having attained the degree of finality or conclusiveness and it necessarily follows from it that the consensus of the *Ummah* is based, on an ‘error’, and to say so is not proper i.e. consensus on an error is not possible.

3. The third argument is that the unanimity of *Ummah* has abrogated the verse relating to Will. But a consensus of opinion is not such a reasoning through which a Qurānic verse may be taken to have been abrogated. The consensus rather implies that a reasoning for abrogation does exist, and that merely the existence of consensus, leaving aside the reasoning itself, is not to be relied upon. Besides, one may also argue that when it is patently clear that amongst the *Ummah* there is a body of opinion which is not convinced of the abrogation of the said verse, how, then, the claim of the consensus of the *Ummah* can be correct.

Part Abrogation : But even those who are convinced of the verse relating to Will being abrogated differ among themselves in its scope and extent. One group holds that the verse regarding Will stands abrogated in respect of both heir or non-heir. The other group maintains that the verse regarding Will stands abrogated in its application to the heir but does not stand so abrogated for the non-heir. Rather the directive as to a Will in his favour stands proved and settled. This is the ruling of Haḍrat Ibn Abbas, Hasan al-Baṣrī, Masruq, Ta'us, Zuhak, Muslim Bin Yaṣār and Alā Bin Ziyād. Zuhak has even said : "One who dies without making a Will in favour of relative his virtuous acts get frustrated because of this single omission".

Tā'us is reported to have said : "If a Will is made in favour of a stranger that Will shall be disallowed and the Will shall be made applicable in favour of a non-heir relative. It appears that in the opinion of these people the direction under the verse regarding Will, being obligatory in favour of non-heir relatives subsists. On behalf of these jurists two arguments on this principle have been advanced as under :—

First Argument : The verse regarding heirs, the Prophet's saying and the Ijmā' both prove the rule that "Will made in favour of heirs" is not valid. Absolute Ijma on this (abrogation) is not available because people, for and against such abrogation, are found in every period of history. Hence it became necessary that the applicability of the said verse in favour of relatives, who are not heirs, be kept in tact.

Second Argument : It is the saying of the Holy Prophet that a Muslim who has some property and he wishes to make Will regarding it, he should not pass even two nights without making the Will.⁵⁷ Hence

⁵⁷Muslim : op. cit., pt. vi, *Kuāb al-Waṣīyyat*, p. 74 :

”ما حق امرئ مسلم له شيء يريده ان يوصي فيه بيت ليلتين الا ووصيته مكتوبة

عنده“

it becomes necessary to hold that making of a Will in favour of a non-heir relative is obligatory and this tradition should be considered as confirmatory of the Qur'an. But the generality of the jurists who are convinced of the directive for Will in favour of heir being abrogated, argue that the verse (IV : 12) regulates the distribution of estate after the payment of debt and Will, if any. Therefore, if the deceased does not owe a debt and has not made a Will, his entire estate shall be divided among the heirs, in accordance with their legal shares. This proves that a Will in favour of non-heir relative is not obligatory.⁵⁸

Al-Qurtubi : Allama Qurtubi in his Tafsīr arguing on this question has expressed his opinion in these words : "Undoubtedly, the fact is clear that the obligation of making Will in favour of heir-relatives stands abrogated through Sunnah. Theologians and jurists forming consensus of opinion on this point have based their argument on the Sunnah."⁵⁹

Prophet's Tradition :

The *Hadith* of "No Will for an heir" has been reported through a number of narratives in the books of traditions and every narrative agrees as to its meaning, although here and there some differences do occur in the words of narrations. Dār Qutani has in this connection recorded several traditions in his "*Sunan*".⁶⁰ Thus, in a *Hadith* from Haḍrat

⁵⁸Al-Razi, Abdul Rahman Muhammad Abu Bakr (d. 606 A.H.) : *Tafsīr al-Kabīr*, Cairo, 1938 A.D., vol. v, pp. 67-69.

⁵⁹Al-Qurtubi, Muhammad b. Ahmad (d. 671 A.H.) : *Jāmi' al-Aḥkām al-Qur'ān*, Dar al-Kutub al-Misriyyah, Cairo, 1934 A.D., vol. ii, pp. 243-44:

"فقد ظهران وجوب الوصية للأقربين منسوخ بالسنة وانها مستند المجمعين"

⁶⁰Dar al-Qutni, Ali ibn Umar (d. 385 A.H.) : *Sunan*, Matba' Ansari, Delhi, 1310 A.H., pp. 488-89 :

"(نا) ابو بكر نيسا پوری (نا) یوسف بن سعید (نا) حجاج عن عطاء عن ابن عباس قال قال : "رسول الله صلعم لا يجوز الوصية للوارث الا ان يشاء الورثة"، (نا) عبید الله بن عبد الصمد بن المہدی (نا) محمد بن عمرو بن خالد (نا) ابی عن یونس بن راشد عن عطاء الخراسانی عن عكرمة عن ابن عباس قال قال : "رسول الله صلعم الا لا يجوز لوارث وصية الا ان يشاء الورثة"،

(نا) علی بن ابراهيم بن عيسى (نا) احمد بن محمد بن الماسرجسی (نا) عمر بن زرارۃ (نا) زیاد بن عبد الله (نا) اسمعيل بن مسلم عن الحسن بن عمرو بن خارجة قال قال : "رسول الله صلى الله عليه وسلم لا وصية لوارث الا ان يجيز الورثة"

Ibn Abbas as quoted by Dār Qutni the text is “لا يجوز الوصية للوارث”، and in another it is “لا يجوز لوارث وصية”. Dār al-Qutni has also narrated two reports from ‘Amru Bin Kharjah. In one of them it is reported as ‘وصية لوارث’ and in another it is “لا يجوز لوارث وصية”. This text agrees with the phraseology of the second narrative of Ibn ‘Abbās. Dar Qutni has reported one more narrative of Haḍrat Ja‘far Bin Muhammad from his father. Its language is “لا وصية لوارث”. This agrees with the first narrative of ‘Amru Bin Kharjah.

Baihaqi as well has recorded traditions on the same theme through his own authorities.⁶¹ The words of the narrative that are stated to be

(Contd. from page 457)

(نا) احمد بن محمد بن زياد (نا) عبدالرحمن بن مرزوق (نا) عبدالوهاب (نا) سعيد عن قتاده عن شهر بن حوشب عن عبدالرحمن بن غنم عن عمرو بن خارجة قال : ”خطبنا رسول الله صلعم بمنى فقال ان الله عزوجل قد قسم لكل انسان نصيبه من الميراث فلا يجوز لوارث وصية الا من الثلث“،

(نا) احمد بن كامل (نا) عبيد بن كثير (نا) عباد بن يعقوب (نا) نوح بن دراج عن ابان ابن تغلب عن جعفر بن محمد عن ابيه قال قال : ”رسول الله صلى الله عليه وسلم لا وصية لوارث ولا اقرار بدين“.

⁶¹Al-Baihaqi, Ahmad b. al-Husain (d. 458 A.H.) : *Al-Sunan al-Kubra'* Deccan, 1953, vol. vi, pp. 412, 263-64 :

”قد اخبرنا ابو بكر مورق عن عبدالله بن جعفر ثنا يونس بن حبيب ثنا ابو داود ثنا اسمعيل بن عياش عن شرحبيل بن مسلم الخولاني سمع ابو امامة يقول شهدت رسول الله صلى الله عليه وسلم في حجة الوداع مقتعة يقول ”ان الله قد اعطى كل ذى حق حقه فلا وصية لوارث“

انا ابو عبدالله الحافظ اخبرنى عبدالرحمن بن الحسن القضى ثنا ابراهيم الحسين ثنا آدم بن ابى اياس ثنا ورقاء عن ابن ابى نجيح عن عطاء بن ابى رباح عن ابن عباس فى قول عزوجل ”يوصيكم الله فى اولادكم للذكر مثل حظ الانثيين“ قال كان الميراث للولد وكانت الوصية للوالدين والاقربين ففسخ الله من ذلك ما احب فجعل للولد الذكر مثل حظ الانثيين وجعل للوالدين السدس وجعل للزوج النصف والربع وجعل الربع والثلثين رواه الشيخان عن محمد بن يوسف عن ورقاء“

انا ابو متوكل احمد بن محمد بن احمد بن الحارث الفقيه انا على بن عمر الحافظ ثنا ابو بكر النساورى ثنا يوسف بن سعيد ثنا حجاج ثنا ابن جريج عن عطاء عن ابن عباس قال قال : ”رسول الله صلعم : لا يجوز الوصية لوارث الا ان يشاء الورثة“ - عطاء هذا هو الخراساني لم يدرك ابن عباس ولم يره قاله ابو داود السجستاني وغيره وقد روى من وجه آخر عنه عن عكرمة عن ابن عباس“

(Contd. next page)

from Haḍrat Abu Umamah are “فلا وصية لوارث” which are in agreement with the two stated narratives of Haḍrat Ibn ‘Abbās and Amru Bin Kharjah. Another narrative is stated from Haḍrat Ibn ‘Aḥbās as well, the words of which are “لا يجوز الوصية لوارث”. This clause agrees with the narrative of Ibn ‘Abbās as stated by Dār Qutni. This tradition though has been called as “unlinked” (*munqati‘*, in chain of reporters) because its narrator is ‘Atā Khurasani from Haḍrat Ibn ‘Abbās. ‘Atā Khurasani had not heard from Haḍrat Ibn ‘Abbās. But in another report of ‘Atā Khurasāni Haḍrat ‘Ikramah is stated to be the link between him and Haḍrat Ibn ‘Abbās. Hence this tradition is held to be *Muttaṣil* (i. e. continuous in chain of reporters).

Abū Da‘ūd in his “Sunan” has two chapters on this question and quotes two traditions.⁶² The words of those traditions are in agreement with two narratives of Dār Qutni and with the one of Baihaqi.

Imam Tirmizi as well has reported the traditions concerning this question under chapter “لا وصية لوارث”⁶³. He has quoted one from Haḍrat Abu ‘Umamah Bahili and the other from Haḍrat Amru Bin Kharjah. In both of them as well the text is “لا وصية لوارث” (No Will for an heir)

(Contd. from page 458)

(اخبرونا) ابو عبدالله الحافظ ثنا ابو العباس محمد بن يعقوب، انا الربيع بن سليمان انا الشافعي انا ابن عيينة عن سليمان ال ا حول عن مجاهد ان رسول الله صلعم قال : لا وصية لوارث، (قال الشافعي وروى بعض الشاميين حديثا ليس محل شبهة اهل شام بان بعض رجاله مجمولون عن النبي صلعم فروينا منقطعاً واعتمدنا على حديث اهل المغازي عامة ان النبي صلى الله قال عام الفتح لا وصية لوارث واجماع العامة على هذا القول)۔

The year of the conquest of Mecca in the above narration appears to be a mistake here; it should be the year of departing *Hajj*. (T.R.)

⁶²Abu Da‘ud, Sulayman b. Ash‘ath (d. 275 A.H.): *Sunan*, Karachi, p. 396, (*Kitāb al-Wasāyā*) :

”حدثنا عبد الوهاب بن جدة قال ابن عياش عن شرحبيل بن مسلم قال سمعت ابا امامة قال سمعت رسول الله صلعم يقول ان الله قد اعطى كل ذي حق حقه فلا وصية لوارث“

”احمد بن محمد المروزي حدثني علي بن حسين بن واقد عن ابيه عن يزيد النحوي عن عكرمة عن ابن عباس رضى الله عنه - ان ترك خيراً والوصية للوالدين والاقربين فكانت الوصية كذلك حتى نسختها آية الميراث“۔

⁶³Al-Tirmizi, Essa b. Muhammad (d. 279 A.H.): *Al-Jami‘*, Karachi, (*Kitāb al-Wasayō*) :

”حدثنا هناد وعلی بن حجر قالوا اخبرنا اسماعيل بن عياش نا شرحبيل بن مسلم الخولاني عن ابي امامة الباهلي قال سمعت رسول الله صلعم يقول في خطبة عام حجة
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which is in agreement and support of the above stated narratives. Thus five texts are in agreement with the said statement.

Imam Nasa'i as well has quoted exactly on the same authority three traditions from Amru Bin Kharjah⁶⁴ In two of these narratives the text is "فلا وصية لوارث" which agrees with the text of the five above stated traditions and one text is "فلا يجوز لوارث وصية" which is in agreement with a version reported by Dar Qutni from Haḍrat Ibn 'Abbās, with another of 'Amru Bin Kharjah and with the version given by Baihaqi from Ibn 'Abbās. Consequently three reports agree on this text.

Ibn Mājah as well has quoted a tradition concerning this question.⁶⁵ Thus, he reports a tradition from Amru Bin Kharjah. The words are,

(Contd. from page 459)

الوداع ان الله تبارك و تعالى قد اعطى كل ذى حق حقه فلا وصية لوارث، الولد للفراش وللعاشر الحجر وحسابهم على الله تعالى و من ادعى الى غير ابيه او انتمى الى غير مواليه فعليه لعنة الله التابعة الى يوم القيامة لا تنفق امرأة من بيت زوجها الا باذن زوجها قيل يا رسول الله ولا الطعام قال ذالك افضل اموالنا وقال العارية مودة والمنحة مردودة والدين مقضى والزعيم غارم، وفي الباب عن عمرو بن خارجة و انس بن مالك هذا حديث حسن، وقد روى عن ابى امامة عن النبى صلعم من غير هذا الوجه و رواية اسمعيل بن عياش عن اهل العراق و اهل الحجاز ليس بذالك فيما يتفرد به لانه روى عنهم منا كبير و روايته عن اهل الشام اصح هكذا قال محمد بن اسمعيل سمعت احمد بن الحسن يقول قال احمد بن حنبل اسمعيل بن عياش اصلح عندنا من بقية الخ

"حدثنا قتيبة نا ابو عوانة عن قتادة عن شهر بن حوشب عن عبد الرحمن ابن غنم عن عمرو بن خارجة ان النبى صلى الله عليه وسلم خطب على ناقته وانا تحت جرائها وهى تقصع بجرائها و ان لعبها لسميل بين كتنفى فسمعه يقول ان الله عزوجل اعطى كل ذى حق حقه فلا وصية لوارث والولد للفراش وللعاهر الحجر، هذا حديث حسن صحيح"

⁶⁴Al-Nasa'i, Abdul Rahman b. Ahmad (d. 302 A.H.): pt. ii, p. iii:

"اخبرنا اسمعيل بن مسعود قال ثنا خالد قال حدثنا شعبة قال ثنا قتادة عن شهر بن حوشب الخ"

"اخبرنا عتبة بن عبد الله المروزي قال اخبرنا عبد الله بن المبارك قال اخبرنا اسمعيل بن ابن خالد عن قتاده عن عمرو بن خارجة الخ"

⁶⁵Ibn Majah, Muhammad ibn Yazid al-Rab'i (d. 273 A.H.): Sunan, Karachi, pp. 194-95:

"ثنا ابو بكر بن ابي شبيب ثنا يزيد بن هارون انابا سعيد بن ابي عروبة عن قتاده

الخ

(Contd. next page)

“فلا يجوز لوارث وصية”. Another tradition which he has narrated from Haḍrat Abu Ummah Bāhaili, the text whereof is “لا وصية لوارث”. The third tradition has been narrated from Haḍrat Ibn Abbās. In its text also it is “لا وصية لوارث”. Thus the text of one narrative of Ibn Majah is in agreement with the said three narratives of Dār Qutni and Baihaqi and the text of two traditions is in agreement with the above referred seven traditions.

Analysis :—On critical examination of all the above reports it can easily be concluded that altogether nine narratives are in agreement on the words “لا يجوز لوارث وصية” and four agree on “لا وصية لوارث”. This leaves two narratives in the text “لا يجوز الوصية لوارث”. But the differences of these texts do not create any difference in the intent and purpose of the traditions. All the texts mean that making a Will in favour of an heir is invalid. Nine texts of traditions have the texts in which the word “لا” the negative of species has been used. It follows therefrom that all species of Will have been prohibited for the heir. That is, for no part of the Will of whatever quantum an heir shall be eligible. In the four texts it is “لا يجوز لوارث وصية” wherein the word “وصية”, as common noun, has been used in the negative context; and it is a rule of interpretation that when a common noun occurs in the negative context it gives the meaning of generalising the negative sense. Thus the tradition “لا يجوز لوارث وصية” means that no part of a Will is valid for an heir whether the Will be regarding a big or small property. This meaning agrees with the text “لا وصية لوارث”. However, in two narratives the word “الوصية” has indicated the use of a proper noun, “معرفة بالام”. But by the use of a proper noun it does not necessarily follow that there is some difference in the meaning from the previous traditions in as much as the “الف لام” in “الوصية” i.e. the sign indicating a proper noun may also be indicating the species which would lead to the meaning that no species of Will in favour of an heir is valid; and it may also indicate “استغراق”. In such a case, the meaning of these words shall be the same as their meaning when they occur in the negative context of a common noun. That is to say, no part of Will is valid for an heir. This explanation proves that all these traditions are the same regarding their meanings. However,

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”حدثنا هشام بن عمار ثنا محمد بن شعيب بن شاپور ثنا عبدالرحمن بن يزيد بن جابر عن سعيد بن سعيدانه حدثنا عن انس بن مالك قال اني تحت ناقة رسول الله صلعم يسيل على لها بها اني سمعته يقول ان الله قد اعطى كل ذي حق حقه الا لا وصية لوارث”

it is possible to argue that as “الف لام” may be used for species or for “استغراق”, it may likewise be said that there is the possibility of “عهد خارجي” being a sign to particularise and its use is intended for a special kind and type of Will. The answer to this is that if the “الف لام” is considered to be particularising a Will, it shall refer to that Will which was made obligatory prior to the revelation of the verse regarding “Inheritance” in the book of God. The meaning of the tradition shall, thus, be that the Will that had been made obligatory in the Book of God by the verse (II : 180) is no mere incumbent. In such a case as well, it shall stand established that the Will in favour of an heir is invalid.

Opinions of Jurists :

Allama Ibn Rushd in *Bidayat al-Mujtahid* has said that the jurists of the 'Ummah are agreed on the point that Will in favour of an heir is not valid.⁶⁶ However, there is a disagreement on the point whether making a Will in favour of a stranger, inspite of the existence of near relatives, is valid, or not. The majority of *Ulamā* maintain that it is valid, though undesirable. Hasan and Ta'us, however, say, “In the presence of non-heir relatives, the Will in favour of a stranger is not valid, rather that Will shall be reverted in favour of the relatives. Same is the opinion of Ishaq as well.

The Will in favour of an heir is also held on the basis of “Ijmā” as void. It is, however, agreed that if the heirs of the deceased permit, the Will in favour of the heir shall be put into effect. But the Zahiris and Imam Muzani are not convinced of its lawfulness even after the permission of the heirs. Imam Shi'rani in his book “*Mizan al-Kubra*” has, in this view, included Imam Zuhri as well with Zāhiris.⁶⁷ The correct and authentic assertion, however, is that Will in favour of an heir may, after the death of the testator, be put into effect with the consent of the heirs. But the consent of heirs given during the lifetime of the testator shall not be relied upon. Detailed discussion on the question of the validity of Will in favour of an heir among the jurists of different school of *fiqh* appears below :

Hanafis : Imam Sarakhsi has stated in ‘Al-Mabsūṭ’ that most of the commentators of the Holy Qur'an agree that the mandate of the verse (II : 180) existed in the early period of Islam till the verse of inheritance (IV : 4) was not revealed. On the revelation of the verse of inheritance the earlier obligation stood abrogated. However, there is a disagreement over the latter verse being abrogatory one. Imam Abu Bakr Razi Al-Jaṣṣāṣ is

⁶⁶Ibn Rushd : op. cit., vol. ii, p. 334 :

“فإنهم اتفقوا على أن الوصية لا تجوز لو ارث لقوله عليه السلام (لا وصية لوارث)”

⁶⁷Al-Shi'rani : op. cit., vol. ii, p. 105.

of the view that the verse of Will is abrogated by the dictate under the verse of Inheritance because there is a clear indication in the latter verse that heritage be divided after (putting into effect) the Will. Besides, the word “وصية” (Will) has been used in verse (IV : 11) as an indefinite noun. Hence, if the Will stood established in favour of parents and relatives, in that event, the word “وصية” (Will) should have been used as proper noun by placing *alif* and *lam* before it. The ordinance of inheritance should have followed thereafter because the Will, in such a context, would be a defined factor. Same is the assertion of Imam Shafi‘i, although according to him abrogation of a verse in the “Book of God” through tradition of the Holy Prophet is not permissible. Al-Jassās, too, does not consider an abrogation of Book of God, through anykind of tradition as valid unless the tradition is a universally accepted one “متواتر”. But most of the Hanafi ‘Ulamā say that the Qur’ānic mandate regarding Will stated in the verse (II : 180) stands abrogated by the Prophet’s saying “ان الله قد اعطى كل ذي حق حقه الا لا وصية لوارث”. This is a well known tradition. The Ulama accepting the tradition have universally acted upon it. Abrogation through such tradition, according to the Hanafis is valid, because the tradition has attained continuity by the acceptance and practice of the ‘Ulamā and the *Ummah*, as if the abrogation has been heard from the Prophet himself. Imam Sarakhsi states “Had we heard the Prophet saying ‘This verse (II : 180) as regards its dictate stands abrogated, do not act in accordance with the dictate, then, acting in accordance with that verse would not have been valid for us, except where the heirs themselves hold the Will as valid.” Haḍart Abu Qulabah has narrated the tradition with the aforementioned words. In some other versions, however, there is an addition of the words “الا ان يجيز الورثة” i.e. except when the heirs permit the same.⁶⁸

In the light of the above quotation, the Hanafi point of view in this respect is that the verse of Will (II : 180) stands abrogated by the Qur’anic verse of Inheritance (IV : 12) and by the Prophet’s tradition as well, because abrogation, according to them, by a well known tradition and even by disconnected tradition is valid. Imam Shafi‘i although does not beleive in abrogation of the mandate of Book of God by tradition, Yet there exists a probability that the verse of Will in the Holy Qur’ān has been abrogated by the other verse of the Inheritance (IV : 4) of the Holy Qur’an and the said tradition is an explanation in support of such abrogation. There is, however, the consensus of opinion of the ‘Ulamā of the *Ummah* on this tradition and the abrogation of the verse shall, thus, be considered to be

⁶⁸Al-Sarakhsi : op. cit., vol. xxvii, pp. 142-43.

final, so far as its being obligatory nature in favour of parent and relatives is concerned.

Malikis : According to Imam Malik as well the verse of Will (II : 180) stands abrogated by the verse of Inheritance (IV:12) and this stands proved from the established tradition of the Holy Prophet that Will in favour of an heir is not valid except when other heirs give their consent to it.⁶⁹

Shafi'i : Imam Shafi'i has dealt with this question at several places in his famous "Kitab al-Umm".⁷⁰ He in the chapter "Abrogated Will" says, "Some learned ones in the Qur'an (commentators) say that making a Will in favour of parents and relative-heirs has been abrogated and that there is disagreement over the Will made in favour of non-heir relatives. Most of the learned ones, whom I have met and from whom I have acquired knowledge, say that the mandate about a Will stands abrogated. This was an operative directive when estates used to be distributed through Wills. When God by Himself promulgated the Ordinance of inheritance, the directive relating to Will as contained in verse (II : 180) stood abrogated. Whatever these persons have said it is, as God Wills, true. If someone asks, "What is the proof of your assertion" the answer to it is God's saying *ولا يوريه* "ولا يوريه" لكل واحد منهما السدس" i.e. except that one-sixth is the share for each of your mother and father.

Ibn Uyainiyah through Sulaiman Al-Ahwal has narrated from Haḍḍrt al-Majahid to me that Prophet said *"ولا وصية لوارث"*, and what I stated that the verse relating to Will (II : 180) is abrogated by the verses relating to Inheritance (IV : 4, 11, 12). To that extent there is no disagreement therein as I learned from my interviews and to the extent of my knowledge. When the verse of directive regarding Will in favour of certain people got abrogated by the verse of Inheritance and when the tradition of will is in support thereof, the Will in favour of heir is not valid and the deduction that Will may be made in favour of non-heir, is the proof that Will in favour of heir is not valid and it gets strongly proved that making of Will in favour of non-heir is valid. This also throws light on the fact that Will made in their favour shall be valid when parent and other relatives are not the heirs. This means that their being heirs makes the Will made in their favour as void.

⁶⁹Al-Zarqani, Muhammad b. Abdul Bāqī (d. 1122 A.H.): Commentary on *Muwatta*, Imam Malik, Matba' Mustafa al-Babi' Cairo, 1381 A.H., 1962 A.D., vol. iv, p. 480; Shah Waliullah Dehlavi (d. 1176 A.H.) : *Al-Musawwa*, Commentary on *Muwatta*, Imam Malik, Matba' al-Salafiyyah, Mecca, 1351 A.H., vol. ii, p. 79.

⁷⁰Al-Shafi'i : op. cit., vol. iv, pp. 80, 89, 108 and 112-113.

Imam Shafi'i, again under Chapter, "الوصية للوارث" says, "All the learned ones of Maghāzi whom I met I found them stating clearly that during the year of the conquest of Mecca⁷¹, they had heard the Prophet saying in His Sermon "لا وصية لوارث" (No Will for an heir) and I found no disagreement regarding this directive among any of the Ulama". Imam Shafi'i again at page 112 of the same book says that God has said:

"إذا حضرنا حدكم الموت ان ترك خيراً الوصية للوالدين والأقربين بالمعروف". (11:180)

So in the above verse of Will God has said about the Will in favour of parents and (near) relatives and in the verse of Inheritance has stated that each of the parents be given one-sixth in inheritance. There is a possibility that these two directions might be so reconciled that parents and relatives be both included in both the dictates. Thus, it might be incumbent upon a Will-maker that he makes his Will in the favour of both so that they may obtain shares through Will as well as obtain shares through inheritance. Another possibility is that the dictate regarding Will stands altogether abrogated; only the right of inheritance remains with them. I found a ready argument that Will in favour of parents and relative-heirs stands abrogated through the verse of inheritance. This is supported by two arguments: One is based on the "Narratives" not connected but authenticated by narrators of Maghāzi. From amongst them one is the same report by Haḍrat Mujahid, as stated earlier. Besides this, one chain of connected narrative has also reached us by another narrator. Moreover, I never found a jurist from amongst the several learned ones hailing from different seats of learning who differed on the point that the directive of Will in favour of parents has been abrogated by the verse of inheritance. After its abrogation, however, two probabilities do arise: One is that the Will in itself is abrogated and the making of Will now is not merely invalid but void. If it is made, it shall stand annulled. The other is that it is not void in itself; rather its obligatory nature has abated. In the circumstances, if the deceased has made a Will in favour of parents, and the heirs thereafter having given their consent, the property that the parents in the circumstance shall get, shall not devolve on them on account of the Will, rather that shall be considered to have really been given gratuitously by the heirs. This is so, because the direction regarding Will in favour of parents is held to be abrogated. On this analogy we have based our verdicts regarding relative-heirs as well (i.e. when they become

⁷¹It appears that there is some misprint in the book where it states about the Prophet's sermon delivered at the conquest of Mecca. The fact is the last sermon was delivered at the occasion of the Departing Hajj.

heirs the Will in their favour too shall be void). Same is the directive proved from the Prophet's tradition.

Imam Shafi'i further says, "In short, I on the basis of the text of God's Book, tradition of the Prophet and the rule of Qiyas hold the Will made in favour of heirs void and the Will made in favour of non-heir relatives and strangers as valid, and according to me this practice is invariably followed."

Hanbalis : The practice laid down by Ahmad b. Hanbal and of Hanbali 'Ulama as well is in accord with the rule of conduct of the three other Imams and their arguments are almost the same that have been advanced on behalf of the said Imams. According to Hanbalis, therefore, Will made in favour of an heir is not valid.⁷²

Shi'ah Imamiyyah : According to Shi'ah Imamiyyah, on the contrary, Will made in favour of an heir to the extent of one-third is valid. Allama Hilli has in "Shra'i' al-Islam"⁷³ said that Will made in favour of a stranger and an heir (both) is valid. Indeed from the writings at other place in the book it also appears that according to Imamiyyah as well the quantum of the property in Will must not in any case be more than one-third. Will regarding more than one-third shall be void.

Zahiris : Imam Ibn Hazm Zāhiri has in his book "Al-Muhalla" written that Will made in favour of an heir is, in all cases, not valid. If the deceased had made a Will in favour of a non-heir and this person (the legatee) becomes an heir at the time of death of the legator, the Will shall become void. If the deceased had made the Will in favour of an heir (which was not then valid) and thereafter the heir lost his status as such the Will shall yet be void, in as much as the Will was void at the time it was made, whether the heirs had given their consent to it or not (i.e. no reliance shall be placed upon their consent).⁷⁴

Validity and execution of Will—the relevant time :

According to Imam Mālik in respect of a Will being lawful or unlawful, the day of its being put into effect shall be relied upon, not the day of the death of the legator. Whereas, according to Ibn Hazm, if the heir at the time

⁷²Al-Kharqi, Umar b. al-Husain (d. 344 A.H.): *Al-Mukhtasar*, Damascus, 1384 A.H., 1904 A.D., p. 111.

⁷³Al-Hilli : op. cit., vol. i, pt. 2, pp. 259-262.

⁷⁴Ibn Hazm : op. cit., vol. vi, p. 386.

of death of the legator attains the status of a non-heir, the Will shall yet be void, (in as much as it was ab initio void).⁷⁵ According to this writer, the viewpoint of Imam Ibn Hazm is not correct. The hinderance in the way of the Will being removed, there remains no bar in the way of the Will being put into effect. Hence reliance shall be placed on the day when it can be put into effect. It is apparent that the question of the Will being put into effect arises after the death of the legator and when the legatee is not the heir at the time of the Will being put into effect, the Will ought to be held valid at the time of its being put into effect. Moreover, the time relevant for determining the validity or otherwise of the Will is just after the death of the legator, because the Will becomes absolute on the death of the legator and that is exactly the time of putting into effect of the Will. Hence, the legatee's being the heir or not ought to be considered at the time of the Will being put into effect. It also appears from the statement of Ibn Hazm that Will, according to Zahiris, shall be void even after the consent of the other heirs, whereas in the traditions referred to above, after the directive prohibiting Will in favour of heirs, there occurs in some of the texts the phrase as well, "الا ان يجيز الورثة" (if the heirs do consent). It so appears that the Zahiris have considered this phrase, to be against the "Book of God". They think that through the words "لا وصية لوارث" which are apparently the words of the Prophet (but are, in fact, through unspoken revelation, the dictate of God), the form and species of Will have been negatived. It means that God Himself through the words of His Prophet held it void, and what is held void by God, cannot be held validated by the permission of His creatures, i.e. the heirs.

What can be inferred easily from the above remarks of Ibn Hazm is that according to him if the heirs give permission, it shall be considered as gift by the heirs themselves, as is the rule of practice of Imam Shafi'i as well.

Analysis :

The upshot of the above discussion is that a Will in favour of an heir, according to the consensus of the 'Ummah, (excluding the Shi'ahs) is invalid, except when it is consented to, after the death of the legator, by the heirs. Further, the Will in favour of non-heir is not obligatory.

Modern Legislation :

In some of the Muslim countries as Egypt, Syria, Iraq and Tunisia recently there has been some legislation on the point that it is obligatory

⁷⁵Al-Abi : op. cit., vol. ii, p. 318; Ibn Hazm : op. cit., vol. vi, p. 386.

heirs the Will in their favour too shall be void). Same is the directive proved from the Prophet's tradition.

Imam Shafi'i further says, "In short, I on the basis of the text of God's Book, tradition of the Prophet and the rule of Qiyas hold the Will made in favour of heirs void and the Will made in favour of non-heir relatives and strangers as valid, and according to me this practice is invariably followed."

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⁷⁴Ibn Hazm : op. cit., vol. vi, p. 386.

of death of the legator attains the status of a non-heir, the Will shall yet be void, (in as much as it was ab initio void).⁷⁵ According to this writer, the viewpoint of Imam Ibn Hazm is not correct. The hinderance in the way of the Will being removed, there remains no bar in the way of the Will being put into effect. Hence reliance shall be placed on the day when it can be put into effect. It is apparent that the question of the Will being put into effect arises after the death of the legator and when the legatee is not the heir at the time of the Will being put into effect, the Will ought to be held valid at the time of its being put into effect. Moreover, the time relevant for determining the validity or otherwise of the Will is just after the death of the legator, because the Will becomes absolute on the death of the legator and that is exactly the time of putting into effect of the Will. Hence, the legatee's being the heir or not ought to be considered at the time of the Will being put into effect. It also appears from the statement of Ibn Hazm that Will, according to Zahiris, shall be void even after the consent of the other heirs, whereas in the traditions referred to above, after the directive prohibiting Will in favour of heirs, there occurs in some of the texts the phrase as well, "إلا ان يجيز الورثة" (if the heirs do consent). It so appears that the Zahiris have considered this phrase, to be against the "Book of God". They think that through the words "لا وصية لوارث" which are apparently the words of the Prophet (but are, in fact, through unspoken revelation, the dictate of God), the form and species of Will have been negated. It means that God Himself through the words of His Prophet held it void, and what is held void by God, cannot be held validated by the permission of His creatures, i.e. the heirs.

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Modern Legislation :

In some of the Muslim countries as Egypt, Syria, Iraq and Tunisia recently there has been some legislation on the point that it is obligatory

⁷⁵Al-Abi : op. cit., vol. ii, p. 318; Ibn Hazm : op. cit., vol. vi, p. 386.

for grandfather to make a Will in favour of such non-heir paternal grandsons and grand-daughters whose fathers are dead in the lifetime of the grandfather. (For details see "law of Wills" pp. 205-16 *supra*; also see Section 328 *infra* relating to the inheritance of paternal grandsons and grand-daughters).

Conclusion :

This writer, having given his anxious thought to the matter in question, has come to the conclusion that the tradition of the holy Prophet as referred to above being well known and because of its acceptance by *Ummah* has attained the degree of a Universal Tradition and is conclusive on the point at issue. By another principle of jurisprudence, the particularization or attaching condition to an absolute verse of the holy Qur'an by means of a well known tradition, according to both Hanafis and Shafi'is, is perfectly, in order. Thus the Prophet's traditions referred to above, having attained universal acceptance, shall remain effective governing the verse of "Will" (II:180), for making a Will in favour of non-heirs. Again, this shall not be obligatory or mandatory; it shall rather be desirable or recommendatory. There are two reasons for this : One is that the word "كتب" (contained in the text) covers mandatory, obligatory as well as recommendatory nature of the act. However in view of an over all study of the Qur'anic verse regarding "Will" and of the verses regarding "Inheritance" and the traditions of the holy Prophet, Ijma' and the constant practice of the 'Ummah, the directive making a Will, on the basis of desirability, in favour of non-heir is fully established, although compared with a stranger, a non-heir relative should always be preferred. (For further discussion on the desirability of "Will" also see Commentary under Section 227 pp. 198-217 *supra*).

Indo-Pakistan Courts' View :

There is, regarding Will, consensus of opinion of all the High Courts of Indo-Pak sub-continent on the point that Will in favour of an heir (without the consent of other heirs) is not valid, and that a Will can not be made in favour of strangers (non-heirs) for more than one-third of the estate of the deceased.⁷⁶ However, in case of the legator being a Shi'ah, the Will in favour of heirs shall, without the consent of other heirs, be valid and enforceable to the extent of one-third of the estate.

⁷⁶², Cal., 184 (1903) 3, Cal., 683; 39, IC, 83; 42, All., 497 = 611, C. 947; 54, All., 93; 136, I.C., 454; (1916) 41, Bom., 377; (1932) 59, I.A., 74; AIR 1933, Oudh, 142 = 150 IC 330; AIR 1934, Lah., 427 153 IC 33; AIR 1944, Oudh, 139 216 IC 276; PLD 1951, Kar., 420,

Modern Legislation :

So far as the discharge of the rights of others against the deceased is concerned the Laws of Will of Egypt 1946 (Section 4) of Syria 1953 (Section 262) of Tunisia 1958 (Section 87) and of Morocco of 1959 (Section 223) have, more or less, adopted the same order as outlined in the Section codified herein-above, except that in those laws it has been specifically provided that the Obligatory Will shall get precedence over Voluntary Wills.

Summary :

In the light of the above discussion, the order of rights and obligations governing the estate of deceased shall be as under:—

1. The expenses of funeral rites and ceremonies of the deceased.
2. After the expenses of funeral rites and ceremonies have been met, the rights (dues) of others against the deceased shall be paid. Regarding God's rights, except *Zakāt* all dues against the deceased shall lapse due to his death and it shall not be obligatory upon his heirs to discharge them. Indeed, if *Zakāt* had become due and payable in his lifetime, the same shall be paid after the discharge of the people's rights against the deceased.
3. After the payment of debts and *Zakāt*, the Wills made by the deceased in favour of non-heir relatives or strangers (as the case may be) shall be put into effect to the extent of one-third of the estate. In the event of the Wills being for more than one-third, if the heirs agree, the Wills may be put into effect regarding more than one-third as well. The deceased may make a Will of his property for discharging God's rights as well, for instance, pious offerings, expiation or religious penal payment, pilgrimage etc., in which case the law of Wills shall accordingly apply to them.
4. After meeting funeral rites and ceremonies, payments of debts and execution of the Wills in accordance with law, the remaining estate shall be divided among those heirs whose rights of inheritance stand proved under the Qur'an and Sunnah of the Prophet and by the consensus of the Companions of the Prophet, details whereof are to be found in the following chapters.

CHAPTER XXXV

ORDER OF ENTITLEMENT TO INHERITANCE

Section 287. The order in which the persons shall be entitled to inheritance is as under:—

Order of entitlement to inheritance

1. *Dhawi al-Furuḍ* (Sharers).
2. 'Asbāt (Residaries).
3. *Radd'ala Dhawi al-Furuḍ* (Return to Sharers, if there is no 'Asbah).
4. *Dhawi al-Arḥām* (distant kindred).
5. *Mawla al-Muwalat*.
6. *Muqir lahu Bil Nasab* (Person in whose favour paternity has been acknowledged by the deceased).
7. *Muṣā Lahū bi jami' al-māl* (Legatee for the whole of property).
8. *Bait al-Māl* (Public Treasury)

COMMENTARY

There is some disagreement among the different Schools of Islamic law about the persons and the order in which they are entitled to inherit the property left by a deceased Muslim. This disagreement is found not merely between the Sunni and the Shi'ah *fiqh* but also among the different schools of Sunni *fiqh*. The Hanafis, however, have admitted to inheritance a wider range of the persons as compared to those described by other schools of *fiqh*. The heirs and their order of succession as in the different schools of *fiqh* are enumerated hereunder¹:—

Hanafis :

According to the Hanafis, there are ten groups of persons entitled to inheritance. Their order is as under :—

1. *Dhawi al-Furuḍ*.
2. 'Asbāt *Nasabi*.

¹Al-Jurjani : op. cit., pp. 8-11; Ibn 'Abidin : op. cit., vol. v, pp. 538-41; Damad Afandi : op. cit., vol. ii, p. 747.

3. 'Asbāt Sababi i.e. *Mawla al-Itaqah*.
4. 'Asbāt of *Mawla al-Itaqah*.
5. *Radd'ala Dhawi al-Furūd*, i.e. the return of the residue to Dhawi al-Furūd according to their shares, if there is no *asbah*.
6. *Dhawi al-Arḥām*.
7. *Mawla al-Muwalāt*.
8. *Muqir lahu Bil Nasab* i.e. person whose paternity is admitted by the deceased and his lineage is not proved from some one else and the deceased has remained firm on such admission till his death.
9. *Musa Lahu bi Jamī' al-Māl*, i.e. Legatee for the entire property bequeathed by the deceased through Will, when there is no heir at all.
10. *Bait al-Māl*, (Public Treasury).

Malikis :

According to Mālīki jurists the order of entitlement to estate is as under²: —

1. *Dhawi al-Furud* (Sharers).
2. 'Asbāt Nasabi.
3. *Asbat Sababi* i.e. *Mawla al-Itaqah*.
4. Male 'Asbat of *Mawla Itaqah*.
5. *Radd'ala Dhawi al-Furud*, i.e. Return of the remainder estate to Dhawi al-Furud, if there is no 'asbāh.
6. *Bait al-Mal* (on condition of proper management).
7. Dhawi al-Arham i.e. distant kindred, (when the management of *Bait al-Mal* is not proper).

Shafi'is :

According to Shafi'i jurists the order of entitlement to inheritance is under³:—

1. *Dhawi al-Furud* (Sharers).
2. 'Asbat Nasabi.

²Al-Abi, Saleh Abdul Sami' : *Jawahar al-Aklīl*, Cairo, 1366 A.H., 1947 A.D., vol. ii, pp. 328-32.

³Al-Firozabadi : *Al-Muhazzab*, Cairo, vol. ii, pp. 25-32.

3. 'Asbat Sababi i.e. *Mawla al-Itaqha*.
4. *Asbat of Mawla al-Itaqah*.
5. *Bait al-Mal* (Public Treasury).
6. Dhawi al-Arhām (When Bait al-Mal is not properly managed).

Hanbalis :

According to Hanbali school, the order of entitlement to the estate of the deceased is under⁴:—

1. *Dhawi al-Furud* (Sharers).
2. 'Asbat *Nasabi*.
3. 'Asbat Sababi i.e. *Mawla al-Itaqah*.
4. Male Asbat of *Mawla al-Itaqah*.
5. *Mawla al-Mawalat*.
6. Radd 'āla Dhawi al-Furud (Return to the sharers, if no 'asbah.)
7. Dhawi al-Arhām.
8. Bait al-Mal (Public Treasury).

Shi'ah :

According to Shi'ah Imamiyyah the heirs are of two kinds :—

A. *Sababi Heirs* : The heirs whose relationship is established through marriage, as husband and wife.

B. *Nasabi Heirs* : The heirs who are related to the deceased through lineage.

Under the two above-stated kinds, the order of inheritance has been established as under⁵:—

1. Dhawi al-Furud (Sharers).
2. 'Asbat (Residuaries).
3. *Mawla al-Itaqah*.
4. *Male asbat Mu'tiq*.
5. *Mawla al-Muwalat*.
6. Radd 'ala Dhawi al-Furud (Return of the remainder to the sharers).

⁴Abul Barkāt : *Al-Muḥarrar*, Cairo, vol. i. pp. 294-97.

7. Dhawi al-Arhām.

8. Wala al-Imam.

Grades of Inheritance : Shi'ah heirs, according to their respective rights, are divided into three grades and every grade is divided into two classes, the details are as under :—

First Grade : (i) Parents.

(ii) Children and children's children (howsoever low in degree).

Second Grade : (i) Ancestors (howsoever high in degree).

(ii) Brother, sister and their children (howsoever low in degree).

Third Grade : (i) Paternal uncle.

(ii) Maternal uncle.

Under the Shi'ah *fiqh*, the heirs of the first grade exclude the heirs of the second and third grade and the heirs of the second grade exclude the heirs of the third grade, but the heirs of each grade of both classes inherit the estate together, but the nearer of each class excludes the remote.⁵

Zahiris :

According to Zahiris the order of entitlement is as under :—

1. Dhawi al-Furud (Sharers).

2. 'Asbat (Residuaries).

3. *Mawla al-Itaqah*.

4. *Male Asbat of Mawla al-Itaqah*.

5. *Muqir Lahu bil-Nasab*.

6. *Bait al-Māl*.⁶

Author's View :

This author has adopted the order of inheritance in accordance with the Hanafi rule of conduct in connection with each persons entitled to inherit

⁵Al-Hilli : op. cit., pt. iv, pp. 192-94.

⁶Ibn Hazm : op. cit., vol. vi, pp. 371-74.

the estate of the deceased. Following this order, however, the viewpoints of the other schools of *fiqh* have also been stated. The reason is that according to Hanafi *fiqh* the number of persons entitled to inherit is the largest. They also include persons entitled to inherit according to other schools of *fiqh*. Indeed, in following the said order of the Hanafis, the law has been codified in the Section hereinabove in respect of those heirs only who in these modern times may be available to get the estate. That is, the details of the shares of *Mawla Itaqah*, his male *Asbāt* have all been dropped as obsolete. *Mawla al-Mawalat*, though very rare, has, however, been included.

Section 288. There are three kinds of heirs by lineage as

Kinds of heirs by lineage under:—

1. Dhawi al Furūd (Sharers)
2. 'Asbāt (Residuaries)
3. Dhawi al-Arham (Distant kindred)

COMMENTARY

In the terminology of the law of inheritance "*Dhawi al-Furud*" or "*Ashab al Furud* or *Farā'id*" are those relative-heirs whose shares in the estate of the deceased have been fixed by the Holy Qur'an itself. Included in the category are also those heirs for whom in one situation "half" and in another situation "one-fourth" or one-eighth share is fixed depending on the circumstances in which they inherit.

The jurists have defined "*Dhawi al-Furud*" thus : Dhawi al-Furud are those heirs for whom the shares are fixed by the Qur'an or Tradition, or by *Ijma* (consensus) of the 'Ummah.⁷ *Furud* or *Farā'id* is the plural of *Fariḍah* which means 'appointed' or 'fixed'. *Dhawi* is the plural of *Dhu*, which means "Master". Thus, literally though each sharer may be called '*Dhu Fard* (sharer) but technically "*Dhu Fard*" is taken to mean the named heir whose share is fixed by the Book of God, Tradition of the Prophet or *Ijmā'*.

⁷Abdullah b. Mahmud b. Mawdud : op. cit., vol. v, p. 86 :

"هم كل من كان له سهم مقدر في كتاب الله تعالى او في سنة رسوله او بالاجماع"

Al-Sarakhsi : op. cit., vol. xxix, p. 138 :

"اصحاب الفرائض هم الذين لهم سهام مقدرة ثابتة بالكتاب و السنة او

الاجماع"

Al-Jurjani : op. cit., p. 8 :

"وهي الذين لهم سهام مقدرة في كتاب الله او سنة رسوله او الاجماع"

Dhawi al-Furud or “*Ashab Fara'id*”, they have precedence over all the other heirs, firstly, because God Himself has ordained their shares in His Book and, secondly, because the Prophet has explained; “First of all give away the shares of *Ashab al-Fara'id*, thereafter what is left is for the nearer male”.⁸ From this tradition, it is established beyond doubt that first of all those heirs shall be given their shares whose shares are fixed by the Qur'ān, Tradition and *Ijma*.

‘*Asbāt* : The relatives who bear relationship nearest to the side of the deceased are called “*Asbāt*” (sing. ‘*asbah*) as son, brother. After giving away their fixed shares to “*Dhawi al-Furud*” in the estate left over, *Asbat* have their rights. The corresponding term in the English language to this is “Residuary”. But this English term, however, merely points to the “right” of a category of an heir and not to the “nature of the *Asbah* himself”. Hence, this English term is not equally comprehensive. It does not in the real sense cover the definition of ‘*Asbah*, but since this term is currently used in English, this writer has also adopted the same.

“*Dhawi al-Arham*” : All those relatives of the deceased who are neither “*Dhawi al-Furud*” nor “*Asbāt*” are included in “*Dhawi al-Arham*”, such as maternal uncle, mother’s sister.

Section 289. *Dhawi al-Furud* are of two kinds:—

- Kinds of *Dhawi al-Furud* (a) *Dhawi al-Furud* by affinity.
(b) *Dhawi al-Furud* by lineage.

COMMENTARY

(a) *Dhawi al-Furud* by affinity: *Dhawi al-Furud* by affinity are the heirs caused by mutual relationship which arises by their being married to each other. They are two: (1) Husband, and (2) Wife. Marriage is the cause of the

⁸Al-Bukhari : op. cit., vol. 2, chap. xxxv, p. 997 :

“الحقوا الفرائض بأهلها فما بقي فهو لأولى رجل ذكر”

Al-Nawawi : *Ṣaḥīḥ al-Muslim*, op. cit., vol. xi, p. 52 :

“اقسموا المال بين اهل الفرائض على كتاب الله فما تركت الفرائض فلا ولى رجل ذكر”

Al-‘Asqalani : *Fath al-Bārī*, op. cit., vol. xv, p. 12; Al-Shawkani, Muhammad b. Ali (d. 1255 A.H.) : *Nayl al-Awtar*, Matba‘ Mustafa al-Babi, Cairo, 1961 A.D., vol. vi, p. 59; Al-Ayni, Badruddin (d. 855 A.H.) : ‘*Umdatul Qārī*, Cairo, 1348 A.H., vol. xxiii, pp. 236-41.

wife's getting inheritance from her husband and of the husband getting it from his wife. It is the relationship by affinity. For purposes of inheritance, it is essential that marriage between them be valid and subsisting in fact or in law, at the time of their death. In case of the marriage being *fāsid* or void no question of inheritance arises between them. (see Vol. 1, pp. 106, 108 *Supra*). There is an *Ijmā'* on this proposition.⁹ In some cases the husband is also the heir to his wife because of his relationship by lineage with her as well. In that case the question of the subsisting of marriage at the time of death does not arise. The marriage between them at the time of one's death will be relevant only if the share is claimed by affinity.

(b) *Dhawi al-Furud by lineage* : Dhawi al-Furud by lineage are those whose relationship with the deceased exists by lineage. Dhawi al-Furud by lineage are ten : (1) Father, (2) Mother, (3) Daughter (but not son), (4) Son's daughter, (5) Full sister, (6) Consanguine sister, (7) Uterine sister, (8) Uterine brother (9) Grandfather, (10) True grandmother (no female intervening).

Modern Legislation :

In the Inheritance law of Egypt, 1943 (Section 8) of Syria, 1953 (Section 265), of Tunisia, 1956 (Sections 89-98) and of Morocco, 1958 (Sections 231-43) the law on the subject has been codified and the shares by affinity and lineage have been stated according to the dictates of the Qur'an and Sunnah.

Section 290. There are two situations in which the husband inherits the estate from his deceased wife, as given below:—

- (1) The husband, in case of there being no issue of the deceased wife, shall get half of her estate.
- (2) The husband, in case of there being an issue of the deceased wife, shall get one-fourth of her estate.

⁹Al-Haskafi, Ala Uddin : *Al-Durr al-Muntaqa* o.m.o., *Majma' al-Anhur*, Cairo, vol. ii, p. 747 :

“فلا توارث بفساد ولا باطل اجماعاً”

Abu Zahra ; op. cit., pp. 141-42; Yusuf Musa : op. cit., p. 153.

Explanation : The issues in whose presence the share of the husband (or wife) gets reduced are the son, daughter, grandson, son's daughter or grandson's son or daughter (of howsoever low in degree). The issue of a daughter is not included therein.

COMMENTARY

By 'husband' is meant the husband of the deceased. There are two circumstances in which the husband inherits the estate of the wife: One is that there is a son (of howsoever low in degree) or a daughter of the deceased wife; the husband shall then get one-fourth of her estate. In the other case, if there is no son (howsoever low in degree) or a daughter, the husband shall then get half of the estate.

The basis of this rule is the Qur'anic verse (IV : 12), wherein God has said "In what your wives leave your share is half if they have no child. But if they leave a child ye get a fourth, after payment of legacies and debts."¹⁰ The rights of the husband and wife never lapse entirely. But if there be issues (sharer or residuary) their shares get reduced to half of the fixed one. The issues because of whose presence the share of the wife or the husband gets reduced are the son, daughter, grandson, son's daughter or the son of the grandson or the daughter of the grandson. The word "*Walad*" here does not include the issues of the daughter (whether they be male or female).¹¹ If there are the issues of the daughter of the deceased i.e. the maternal grandson, maternal grand-daughter, or the issues of maternal grand-daughter, the share of the wife or the husband shall not get reduced thereby, as they are (*Dhawi al-arḥām*, distant kindred). It is also an established rule that of the husband and wife none excludes the other.

Some Exceptions : If the husband during wife's death-illness pronounces divorce to his wife and the wife dies during the observance of her term of probationary period, (*Iddat*), the husband shall not be her heir as the husband himself is the cause of the termination of the marriage-contract with her. If the husband during his sound health delegates his wife the right of

¹⁰Al-Qur'ān, Surah Al-Nisa (IV : 12) :

”وَلَكُمْ نِصْفُ مَا تَرَكَ أَزْوَاجُكُمْ إِنْ لَمْ يَكُنْ لَهُنَّ وَلَدٌ فَإِنْ كَانَ لَهُنَّ وَلَدٌ فَلَكُمْ الرُّبْعُ مِمَّا تَرَكَنَّ“

¹¹*Al-Jaṣṣaṣ*, Abu Bakr al-Razi (d. 370 A.H.) : *Aḥkām al-Qur'ān*, Cairo, vol. ii, p. 84.

option of pronouncing three divorces to herself and the wife uses this right during her illness and pronounces for herself the irrevocable divorce as authorised by her husband, and during the observance of her term of probation ('*Iddat*) she dies in that illness, the husband shall be her heir, but if the husband dies in the meantime, i.e. during her '*iddat*, she shall not be his heir as she herself, due to pronouncing the irrevocable divorce, is responsible for the breaking off the marriage tie.¹² (Sections 7 and 8 of Muslim Family Laws Ordinance, 1961 has however, altered the position.).

Effect of '*awl* on inheritance by husband :

The above-stated share of the husband is in the case where the estate covers the full shares of *dhawi al-Furūd*. If the estate is not enough to cover the full shares of the *dhawi al-Furūd*, the share of the husband (and the wife too) shall then get reduced in accordance with the application of the rule of '*awl*. (For full discussion on the doctrine of '*awl* see Chapter XXXVI *infra*). For instance, a woman leaves behind her husband, mother, two full sisters and two uterine sisters. Then estate will not be enough to cover the full shares of these sharers. On applying the doctrine of '*awl*, the division shall be as follows. The husband instead of $\frac{3}{6}$ shall get $\frac{3}{10}$, the mother shall get $\frac{1}{10}$ instead of $\frac{1}{6}$, two sisters shall get $\frac{4}{10}$ instead of $\frac{4}{6}$ and the uterine sisters shall get $\frac{2}{10}$ instead of $\frac{2}{6}$. So there will be proportionate decrease in their respective shares.

Doctrine of *Radd* and the spouses :

If after giving away the shares of *dhawi al-Furud* there is some residue from the estate and there is no *asbah* (residuary), then, according to jurists in general, the remaining estate shall revert to *Dhawi al-furud Nasabi* (sharers by lineage) only. It shall not revert to the husband and wife, except in few cases. (For detailed discussion on the doctrine of *Radd 'alā Dhawi al-Furud* see Section 304 *infra*).

Section 291. There are two situations in which the wife inherits as an heir of her (late) husband :—

Inheritance by wife

(1) In case of there being no issue of the deceased husband his widow shall be entitled to get one-fourth of the estate.

(2) In case of there being an issue (male or) female of the deceased or an issue of the male, the widow shall be entitled to get one-eighth of her husband's estate.

¹²Umar Abdullah : *Ahkām al-Mawarīth*, Cairo, p. 126.

Explanation : (1) In case of there being more than one wife of the deceased one-fourth or one-eighth share, as referred to above, shall be divided equally among all the wives of the deceased.

(2) The description of *awlād*, (issues) as made in the preceding section relating to the inheritance of the husband shall also be applicable in case of wife's entitlement to inheritance.

COMMENTARY

The word "wife or widow" refers to the wife or widow of the deceased. The wife of the deceased bearing relationship in affinity with him, because of marriage contract, is an heir of her husband provided the marriage contract is valid and stands established in fact or in law at the time of the death of her husband, whether valid retirement has taken place or not. In case of *fāsid* or void marriage-contract there shall pass no inheritance between them. Likewise, the wife shall not be the heir because of difference of religion, for instance when the husband is 'Muslim' and the wife is 'Kitabiyah'.¹³

The law that a 'Kitabiyah wife' can not be the heir of her Muslim husband, is based on the difference of status between a 'Muslim Wife' and a 'Kitabiyah wife'. On the basis of this difference of status several distinctions in the law have been maintained between a Muslim free and slave wife and a non-Muslim (Kitabiyah) wife. For instance, a Muslim free wife after a valid marriage contract acquires a status and therefore if she commits adultery she is awarded the fixed *Hadd* punishment, whereas for a Muslim slave wife as against a free Muslim woman, the punishment for the same offence is half the fixed *Hadd*. The Kitabiyah wife is not considered of the same status and so she is not punished for adultery with *Hadd*. In the first referred case of a free Muslim wife and a slave Muslim wife, though they have a similar status as Muslims and wives, a distinction in law has been observed between them because of a difference of their social status as recognized between a free and a slave woman. Likewise, a "Muslim wife" and a "Kitabiyah wife", though equal in the status of wifehood, yet there is a difference in their right of inheritance, because of their difference in religion, arising out of the ennobling characteristics of Islam.

¹³ Abu Zahra : op. cit., pp. 141-42; Umar Abdullah : op. cit., p. 124.

Situations of wife's right of inheritance :

Like that of the husband there are two situations of wife's right of inheritance as well:—

1. The first is that there be no issue of the husband.
2. The second is that there do exist issues from any one of the wives of the deceased.

In the first case, the wife is entitled to one-fourth of the estate, whereas in the second case she is entitled to one-eighth of the estate. If there are two or more wives the aforesaid share shall be divided equally among them. The principle is that where the fixation of shares is on the basis of relationship only and the number of heirs has not been specified, the heirs of the same relationship, even where their number is more than one, totally share together in the inheritance allowed or fixed for one. Thus, if the widows of the deceased are more than one, all of them, as explained above, shall be co-sharers in the one-fourth or the one-eighth of the estate (as the case may be).¹⁴

If the son (of the deceased) is a murderer or is a non-Muslim or has turned an apostate, in that case, he shall be considered under law to be non-existent and the share of the husband or the wife (as the case may be) shall not get reduced.¹⁵

Wife's Inheritance and the Principle of 'Awl :

The case of any decrease in the wife's fixed share is also on the same principle as has been discussed in connection with the husband's right of inheritance. If the inheritance should be divisible among heirs and all add upto complete unit among the *Dhawi al-Furuq*, no question of 'awl arises. In case it is not a complete unit, the principle of "awl" shall be adopted. For instance, the husband dies leaving behind the wife, the father, the mother and two daughters. The shares shall decrease so as to dividing them into 27 shares instead of 24 shares. The widow shall thus get 3/27, the father shall get 4/27, the mother 4/27, and the daughters 16/27. The subject of *Awl* has been dealt with in detail in Chapter XXXVI *infra*.

¹⁴Al-Tahawi, Ahmad Muhammad (d. 321 A.H.): *Al-Mukhtaṣar*, Deccan, 1370 A.H., p. 143.

¹⁵Al-Jurjani : op. cit., p. 49.

Condition for wife's Inheritance :

The above stated dictates regarding wife's inheritance shall apply when the marriage in fact or in law is subsisting at the time of the death of the husband. Indeed, if the husband has in his sound health irrevocably divorced his wife and the wife is still observing her probationary period ('*Iddat*') when the husband dies, the woman shall not be his heir, as the marriage on account of irrevocable divorce at once breaks off. The divorce having been effected in sound health, the husband's dying during the wife's observance of probationary period ('*Iddat*') makes no difference. The wife shall not be his heir.¹⁶ If the marriage is dissolved by *Khula*, *Mubarat* or by a court's decree of separation (in the order of an irrevocable divorce) and the husband thereafter dies, the wife shall not yet be the heir because in these circumstances as well, the marriage relationship came to an end, prior to the death of the husband. But if the husband pronounces an irrevocable or *Mughalliazah* divorce to his wife during his death-illness and the husband dies during or after the observance of her probationary period, in such events there is a difference of opinion among the jurists in the matter of wife's right of inheritance. According to the Hanafis, if the husband has died during the '*iddat*', she shall inherit him. (See Vol. I, pp. 327-80 *supra*).

Effect of Death-Illness : Before examining the effect on inheritance of irrevocable divorce pronounced during death-illness, it is advisable to define and describe the conditions of 'death illness'. please see Vol. I, pp. 372-73.

Death-Illness—State of Illness and the State of Health : Muslim Jurists discussing the nature of death-illness have said that in cases of the diseases of consumption and paralysis, if the disease gains an intensity, it shall be classified as illness and if the disease remains constant and chronic the state shall be classified as that of health.¹⁷

Revocable Divorce in death-illness and Inheritance : See Vol. I, p. 374 *supra*.

Irrevocable divorce in death-illness and Inheritance : See Vol. I, pp. 374-79, *supra*.

¹⁶Abū Zahra : op. cit., p. 132.

¹⁷Ibn Abidin : op. cit., vol. ii, p. 435; Ibn Humam : op. cit., vol. iii, p. 155.

Probable cause of death : On the basis of the principle resembling the divorce pronounced by a sick person during death illness, the divorce pronounced in the circumstances wherein the occurring of death is probable, shall not affect the right of inheritance of the wife. For instance, (the pronouncing of divorce at the time of fighting with a killer beast or at the time of being engaged in war.¹⁸ or at the time of engaging in a greatly hazardous enterprise, travel to moon or at like events.

Pakistan Courts' view :

The views that our Pakistani courts have expressed about the death-illness are in accord with the definition given by most of our jurists. Thus, the Supreme Court of Pakistan in the Case of "Shamshad Ali Shah vs. Syed Hassan Shah" (PLD 1964 S.C. 143) held that in order to settle the issue whether the principle of 'death-illness' may be applied, the courts shall have to consider the following facts : —

1. Whether the nature and condition of the illness was such that strengthened the idea in the mind of the sick person that his death shall occur because of that illness or that it induced the fear of death.
2. Whether the sick person was suffering from such an illness that became the immediate cause of his death.
3. Whether the illness was such that disabled him from the performance of his general engagements. Whether such a situation existed that it could produce the fear of death in the mind of the sick person.
4. Whether the illness continued so long that it lessened the fear of his immediate death or that it made the sick person habituated to that misfortune.

Mr. Justice Kaikus in this judgment of the aforesaid case '*Shamshad Ali Shah vs. Hasan Shah*' has written that: "So far as the legal aspect of *marzul maut* is concerned, what is really needed is, as pointed out in '*Ibrahim Goolam Ariff v. Saiboo and others*' that the gift should be made 'under the pressure of the sense of imminence of death.' The rest of the matters which are generally stated in commentaries on Muslim Law as matters requiring investigation in a case of *marzul maut* are really matters relating to evidence.

¹⁸Such and similar instances have been stated in *Majma' al-Anhur*, Cairo, 1319 A.H., vol. i, p. 428.

If the gift had, in fact, been made 'on account of pressure of the sense of imminence of death' the gift would be affected by doctrine of *marzul maut*. There is one point which may be clarified here. It is stated in some commentaries and judgements that death should in fact result from a disease if the doctrine of *marzul maut* is to be invoked. I am unable to agree with this proposition. If a person was suffering from galloping tuberculosis and was therefore under apprehension of death when he made the gift, but he was shot dead by some person or died of an accident, or of cholera or some other epidemic a short time after the gift, I do not see why the doctrine of *marzul maut* should not be applicable. Truly speaking, even the fact that a person survives and does not die at all should not validate a gift which he made under apprehension of death. The validity of the gift is to be determined with reference to the circumstances as they exist at the time of making the gift. Subsequent failure to die cannot have a restorative effect, so as to validate an invalid transaction. The true reason for the invalidity of the gift is the state of the mind of the donor who believes that he is going to die. As he believes that he is going to die he has no intention of making a transfer *inter vivos* and his only intention is to make a transfer which will take effect after his death. A transfer takes effect according to the intention of the transferor. If the transferor has no intention of making a gift during his lifetime no such gift will result. The reason why a gift in *marzul maut* operates as a will is that the intention is to make a testamentary alienation only. This doctrine is not confined to Muslim Law. In Roman Law it is called donation *mortis causa* and it also appears in section 191 of our Succession Act. In accordance with section 191, gifts 'made in contemplation of death' are resumable by the donor if he survives and the power to make such gifts is co-extensive with the power of testamentary disposition. It is true that gifts 'in contemplation of death' are gifts which are to take effect in case the donor dies, but authority can be found in any commentary for the proposition that although the donor does not say so the presumption in the case of gifts made during apprehension of death is that they are to take effect only in case of death. In Jarman On Wills (1951 Edition) at P. 46 it is stated that 'the conditional nature of the gift need not be expressed, it is implied in the absence of evidence to the contrary' and that 'if the circumstances authorise the supposition that the gift was made in contemplation of death, *mortis causa* is presumed.'

"On finding that Mst. Husan Bano was suffering from pneumonia at the time when she made the gift there is a clear case for the application

of the principle of *marzul maut*. The effect of a gift in *marzul maut* is that it operates as a Will. However, in order to operate as a Will it is necessary that there should in the first place be a completed gift." (Also see pp. 71-80 *supra*).

Effect of apostasy on Inheritance : See Vol. I, p. 379 *supra*.

Modern Legislation : See Vol. I of this Code, p. 379 *supra*.

Some cases on death-illness, divorce and Inheritance :

1. An irrevocable divorce is pronounced during ordinary illness. During the observation of the term of probation the illness becomes acute and takes the form of death-illness. The husband dies in that death-illness. The wife shall be the heir because in that case the illness shall be treated to be the death-illness from the very beginning.

2. An irrevocable divorce is pronounced by the husband during his death-illness. During the wife's observing her term of probation the husband is killed or commits suicide. The wife shall be the heir, because the act of pronouncing divorce took place during the death-illness.

3. The husband pronounces an irrevocable divorce during his death-illness but during the term of probation he recovers. Some days later, he is overtaken by some other death-illness and dies during the observance of the term of probation. The wife shall not be the heir because the act of divorce took place during that illness which did not prove to be the death-illness.

4. The husband pronounces irrevocable divorce in his death-illness but recovers during the observance of the term of probation. Some days after, the same disease overtakes him for the second time or under the effect of the previous illness other disease overtakes him that proves to be the death-illness and he dies. The wife in such events shall be the heir because the second illness shall be said to be in consequence of the first one.

5. The wife at the time of pronouncement of divorce by the husband during his death-illness is a *Kitabiyah*. After the pronouncement of divorce she accepts Islam. She shall not be entitled to the estate left by the husband and the husband shall not be considered to be the evader of the wife's inheritance, because at the time when divorce was pronounced she was not entitled to the inheritance.

6. The wife is a Muslim. The husband during his death-illness divorces her irrevocably. The wife turns an apostate but becomes a believer again. She shall not get the husband's estate because her entitlement to the estate lapsed due to her turning an apostate and what lapses is not revived.¹⁹

Some Other Cases :

(a) *Under Hanafi rules of inheritance the wife on her death leaves behind :—*

- (1) The husband and her real brother—the husband shall get the half and the real brother shall get the other half as residuary.
- (2) The husband and her daughter—the husband shall get one-fourth and the daughter shall get one-half as sharer and also the remainder on the basis of the doctrine of *Radd 'ala Dhawi al-Furuq*.
- (3) The husband and her maternal grandson and maternal granddaughter—the husband shall get the half and the maternal grandson and the maternal granddaughter shall get the remainder as *Dhawi al-Arham*.
- (4) The husband, the son (who is her murderer) and the consanguine brother—the husband shall get the half because the son being the murderer is barred from inheritance, and the consanguine brother as '*Asbah*' shall get the remainder. Had not the son been the murderer the husband would have got one-fourth and the son would have got the remainder while the consanguine brother would have been excluded.

(b) The husband on his death leaves behind: —

- (1) The wife, son or the grandson—the wife shall get the one-eighth and the son or the grandson as '*Asbah*' shall get the remainder.
- (2) The wife, the daughter (or the son's daughter)—the wife shall get the one-eighth and the daughter or the son's daughter shall get a half as *Dhu Fard* and the remainder on *Radd*.

¹⁹Abū Zahra: op. cit., pp. 145-46; Umar Abdullah: op. cit., pp. 127-28; Yusuf Musa : op. cit., p. 233-37.

- (3) Two wives, one maternal grandson and a maternal grand-daughter—the wives shall get the one-fourth (which shall be equally divided between them) and the maternal grandson and the maternal grand-daughter shall get the remainder as Dhawi al-Arham.
- (4) The wife and the true uncle—the wife shall get one-fourth and the uncle as *Asbah* shall get the remainder.

Modern Legislation—Law of Inheritance :

Egyptian Law : The irrevocably divorced wife, though divorced during death-illness, shall be deemed to be a wife when she herself has not demanded divorce and is observing her term of probation.

When the son or the grandson to the lowest degree of the deceased is alive the wife's share shall be one-eighth Fard. In the event of their not being present it shall be one-fourth.

In case there are several wives all of them shall be equal sharers in the aforesaid share of the estate. [(Section 11/2)].

Tunisian Law : One or several wives inherit in the two situations as below :—

1. Shall get one-fourth when there is no son or daughter or son's son to the lowest degree.
2. Shall get one-eighth when anyone of the heirs stated above is present. (Section 102).

Moroccan Law : Two persons are entitled to one-fourth as sharers :

1. The husband when there is an issue of any kind from the wife.
2. The wife when there is no issue of any kind from husband.

Section 241 : There is one kind of heir entitled to one eighth — The wife when there is no issue of any kind of her husband. (Section 240-41)

Indo-Pakistan Courts' Decisions :

As far as the right to entitlement to estate is concerned the Fiqh of all the Sections of "Ahle Sunnat Wal Jama'at" observe no distinction in the wife's right to inheritance in the movable and immovable property based on having or not having the issues. But a distinction in the wife's right to inheritance in the movable and immovable property has been made in the Fiqh

of Shi'ah Imamiya. Thus, in the case of *Husain Khan versus Amiri Bibi*, (AWN 1889, 192) it has been held that a Shi'ah wife can be the heir of her husband's land when she has a son from that husband living at the time of the death of that husband. In the case of *Mst. Nautan Jan versus Mst. Mahmudi Begum*, (3 Agra 13) it has been held that such a wife can be the heir in her husband's movable property (only). In the case of *Mirza Ali Hussain versus Sajida Begum*, (21 Mad 2) it has also been held that an issueless Shi'ah wife is not entitled to any share in her husband's lands. It has been held in the case of *Agha Mohammad Jafar versus Kulsum Bibi*, (27 MLJ 115 (PC)) that an issueless wife of a Muslim Shi'ah husband shall be entitled to the one-fourth share in her husband's properties except the lands. Thus, she shall not be entitled to any part of her husband's lands, buildings or their value. In the case of *Muzaffar Ali Khan versus Paravati* (4 ALJ 521. AWN 1907, 221) it has been held that in accordance with the Shi'ah Imamiyah law a widow by whom no child had been alive at the time of her husband's death would not be the heir in any immovable property of her deceased husband. It was ruled in the case of *Syed Murtaza versus Mst. Alhan Bibi* (2 IC 627) that a Shi'ah Imamiya widow who has a child from her deceased husband shall, in accordance with the Shi'ah law, be the heir in both the movable and immovable properties of her husband.

In the case of *Daulai Khatoon versus Amina Bibi* (PLD 1958 WP (Rev.) 67) it was observed that an issueless widow under Shi'ah Law is not an heir of her deceased husband's property (untitled land in this case). In the Shi'ah law, the view of the wife's not being a sharer in the immovable property for being issueless is based on social practice. The Qur'an, however, does not tolerate such discriminatory treatment. According to the writer, therefore, this part of Shi'ah Law is contrary to the dictates and the injunctions of Allah as contained in His Holy Book.

Section 292. There are three situations in which the father inherits from his deceased son:—

Inheritance
by Father

1. As *Dhu Fard* (sharer) he shall get $1/6$ when son of the deceased howsoever low in degree may be alive.

2. As *Dhu Fard* and '*Asbah* (Sharer as well as Residuary), he shall get when the daughter or son's daughter howsoever low in degree is alive.

3. Pure '*Asbah* (Sharer as well as Residuary) when the issue of the deceased and their issues are not alive at all.

COMMENTARY

From father is meant the real and not step father (of the deceased) from whom the deceased is begotten. The step father would rather be called the husband of the mother and not the father of the deceased.

God has specified the share of the father in the Holy Qur'an. If the deceased has left an issue, the father and the mother each shall get one-sixth of the estate (IV : 11). If the deceased has left no issue, his parents shall get the inheritance in the proportion that the mother will be given one-third and the father shall get the residue (IV : 11).

The jurists have described three situations of the father inheriting from his issues as under:—

1. Being only *Dhu Farḍ*.
2. Being *Dhu Farḍ* and '*Aṣḥab* both at one and the same time.
3. Being only the '*Asbah*.

As Dhu Farḍ :

The first situation is the capacity of being only the '*Dhu Farḍ*'. Hence according to all the Sunni 'ulama the father in the capacity of *Dhu Farḍ* shall get one-sixth of the estate as fixed in the Holy Qur'an, when the deceased has left his son or grandson of howsoever low in degree, as the Qur'an itself states "If the deceased has left his issue the father shall get one-sixth share." Same is the view taken by Shi'ah Imamiyah as well.²⁰ For instance, a person dies. He leaves behind him his father and his son. The father shall get one-sixth share and the son as '*Aṣḥab* shall get the residue.

As Dhu Farḍ and '*Asbah* :

The second situation is that the father gets the inheritance in both the capacities of *Dhu Farḍ* and '*Asbah*. Thus, if the deceased, besides his father, leaves behind him such heirs who are only the *Dhawi al-Furud*, the father and all the other *Dhawi al-Furud* shall get their fixed shares and the remainder shall be given to the father as '*Asbah* provided there is no such heir because of whom the father does not inherit as '*Asbah*. That is, there be a son or the grandson. For example, the deceased leaves behind him his

²⁰Al-Hilli : op. cit., pt. iv, p. 186.

father, daughter or son's daughter. In such a case, the father shall get one-sixth share as *Dhū Farḍ* and after being given one-half to the daughter and one-sixth to the son's-daughter, the one-sixth residue shall as well be given to the father as 'Asbah.²¹ This is the rule governing the four schools of *Ahl-i-Sunnat wal Jamā'at*. According to Shi'ah Imamiyah, the father shall get his one-sixth share and the remainder shall be distributed among all of them according to their shares.²² But under Muslim Family Laws Ordinance VIII, of 1961 of Pakistan, the father shall get one-sixth, the daughter shall get one-third of the remainder, and the daughter of the pre-deceased son shall get the rest two-third which her deceased father would have got, had he been alive. For the details in respect of inheritance of the orphan grandson and grand-daughters see Chapter XXXIX, Exclusion and Deprivation (*Hajab wal Hirman*) *infra*.

The basis of the law of *Ahl-i-Sunnat wal Jamā'at* is the Prophet's tradition, 'First give the *Ashab al-Furuḍ* their fixed shares. Whatever remains thereafter is for the nearer male.²³ The Shi'ahs do not accept this tradition.

As 'Asbah Only :

In the third situation, the father inherits only as 'Asbah. For instance, the deceased leaves no heir except his father. In such a case the father as 'Asbah shall be entitled to the entire estate. The reason whereof is to be found in the Qur'anic verse, that where the deceased has no issue, his parents shall get the (entire) estate, wherein one-third is of the mother and the entire residue is of the father.²⁴ In the Qur'anic verse "*Fa in lam yakun lahu waladun wa warithahu abawahu*, the word *walad* includes both the son and the daughter because the meaning of *Walad* is *Maulūd* i.e. given birth to. It may either be the son or the daughter. The father is never completely excluded, rather he excludes the others. Same is the rule of conduct of Shi'ah Imamiya.²⁵

²¹Al-Jurjani : op. cit., p. 18; Abdullah b. Mahmūd b. Mawdūd : op. cit., vol. v, p. 87.

²²Al-Hilli : op. cit., pt. iv, p. 186.

²³Al-Bukhari : op. cit., vol. ii, p. 997; Al-Muslim : op. cit., vol. ii, p. 52; Al-Shawkani : *Nail al-Awtar*, op. cit., vol. vi, p. 59 :

”الحقوا الفرائض باهلها فما البقته فلا ولي رجل ذكر“

²⁴Abū Zahra : op. cit., p. 170.

²⁵Al-Hilli : op. cit., pt. iv, p. 186.

Modern Legislation :

Egyptian Law of Inheritance: Subject to the provisions of Section 21, when the son or the grandson (to the lowest degree) of the deceased is present, the father's Fard share shall be $\frac{1}{6}$. (Section 9).

When the father or the grandfather of the deceased is joined with the daughter or the son's daughter to the lowest degree, he shall be entitled to $\frac{1}{6}$ Fard and after the daughter or son's daughter gets the Fard share, the father being an 'Asbah shall get the residue (Section 21).

Syrian Law of Inheritance : Subject to the provisions of Section 281, the father and the 'Asbi ancestor, when the son or the grandson of the deceased is present, shall be given $\frac{1}{6}$ as Farḍ. (Section 266).

Tunisian Law of Inheritance: There are three situations for the father:—

1. Fard share is $\frac{1}{6}$ when the son or the grand son of the lowest degree of the deceased is present.
2. Fard share and the share due to being residuary, when the daughter and the son's daughter of the lowest degree of the deceased are present.
3. Only the share on account of being residuary when neither the daughter nor the son or son's son of the lowest degree of the deceased are present. (Section 99).

Moroccan Law of Inheritance : When the father or the grandfather of the deceased is joined with a daughter or a son's daughter of the lowest degree, after his Fard share he shall get the residue as 'Asbah. (Section 250).

Section 293. There are three situations in which the mother
Inheritance by
Mother inherits from her deceased son : —

1. If the issue or the issues of the issue of the deceased (to the lowest degree) are alive or two or more than two brothers and sisters of any kind are alive, the mother shall get one-sixth share of the estate.

2. If, of the heirs of the deceased, one of the spouses (the husband or the wife as the case may be) is alive, the mother shall be given one-third of the remaining, after giving due share to the husband or wife when :

- (a) the deceased has the husband and the parents; or
- (b) the deceased has the wife and the parents.

3. If, in the above-mentioned case instead of the father, the grand father is alive the mother shall be given one-third of the entire estate.

COMMENTARY

Mother means the true mother of the deceased. The step mother of the deceased is not entitled to his inheritance because there is neither relationship by lineage nor the relationship by affinity between them.

Three situations of the mother getting the inheritance :

There are three situations of the mother of getting the inheritance from her son or the daughter :—

1. When there are the daughters or the sons or the son's issues or two brothers and sisters of any sort of the deceased, the mother shall get one-sixth share.
2. When there is none of the persons stated above the mother shall be entitled to one-third of the entire estate.
3. When the wife or the husband of the deceased (as the case may be) is there, the mother, after their shares, shall get one-third of the remaining estate.

The rule laid down by 'Abdullah Ibn 'Abbās differs from the rule of conduct stated in case No. 1 above. According to him, in the event of there being two brothers or sisters the mother shall be entitled to one-third of the estate. But in the event of the presence of three brothers or sisters the mother instead of one-third share shall be held to be entitled to one-sixth share.

Ibn Abbas in support of his point of view relies on the Qur'anic verse (IV : 4). He contends that the word "*Ikhwah*" used in this verse is particularly for the brothers but by way of a generic term (*Taghlib*) it covers both the categories i.e. brothers and sisters, as God in the Qur'an says: "وإن كانوا إخوة رجالاً ونساءً" (IV : 176). In this verse the word "*Ikhwah*" is for both the males and the females, not that it covers the male (brothers) only. Relying on the verse IV : 4, Ibn 'Abbas argues that in case

only one sister and one brother (or two brothers or two sisters) are alive the mother shall get the share that has been stated in the Holy Qur'an to be one-third for them. But where the word *Ikhwah* is used it is the plural of "*Akh*" which is used for more than two. Hence the presence of only two (i.e. one brother and one sister) cannot become the cause of reducing the one-third share of the mother as ordained by the Qur'an. However, the share of the mother in the presence of more than two brothers and sisters (in combination) shall be reduced from one-third to one-sixth.

The view of Haḍrat 'Alī is also in accord with the assertion of 'Abdullah Ibn Abbas. Consequently he also, arguing from the said verse, is of the view that as per Qur'anic text a share of one-third is mandatory for the mother. It is only when the son or the daughter of the deceased is alive or his three or more than three brothers are alive, the mother's share will be reduced from one-third to one-sixth.

In this connection, the Hanafis argue that in the context of the rules of inheritance two or more than two shall be treated in the same order. Literally also, two (or more than two) is in the order of plurality. Thus, the event of change in the fixed share from one to two or more than two, in referring to the number of heirs the mandate shall be the same, as indicated in the inheritance of several other categories. For example, "*Bintain*" covers two daughters as well as three. The rule of inheritance relating to *Ukhtain* (two sisters) is like that of the three or more of them and so the rule of inheritance of two uterine brothers is like that of three of them. Thus, the mother whose share is reduced to one-sixth on account of the presence of three brothers and sisters, her share shall, by the presence of two as well, be reduced to the one-sixth only.

Some 'Ulama have explained that scale for two or for more than two covers a whole 'group' of such persons in its application. For *Ikhwān* (two brothers), *Ikhwah* is also spoken of.²⁶

Shi'ah Imamiyyah's Rule :

According to Shi'ah Imamiyyah when there is someone of the male issues, or there are two or more than two true or consanguine sisters alongwith the father, the mother shall get one-sixth as her share,²⁷

²⁶Al-Jurjani : op. cit., p. 29 :

”الأخوان يقع عليهما اسم أخوة“

”الاثنان فما فوقها جماعة“

²⁷Al-Hilli : op. cit., pt. iv, p. 184.

Zahiriyyah's Rule :

Imam Abu Muhammad Ibn Hazm has adopted the rule of the conduct of Ibn 'Abbas in this matter. Thus, in his noted book "*Al-Muhalla*" he writes, "If the deceased has one brother or two brothers or two sisters or one sister and one brother and has no male issue or the male issues of the issue, the mother shall get one-third. If, however, there are three brothers or sisters, or three brothers and sisters, the mother shall get one-sixth as her share."²⁸ Dr. Yusuf Musa in his book "*Al-Tarka wal Mirath Fil Islam*" (p. 225) has also expressed his inclination towards acceptance of the opinions of Hadrat Ibn Abbas, Hadrat 'Ali, the Shi'ah Imamiyyah and the Zahiriyyah.

Zaidiyyah's Rule :

The rule of conduct of Zaidiyyah sect in this regard is that the brothers and the sisters if uterine (*Akhyāfi*) the mother's share shall not be reduced from one-third to one-sixth, whereas in the presence of non-uterine ones i.e. in the presence of consanguine brothers or true brothers, the mother's share shall be reduced from one-third to one-sixth. However, the practice of the jurists, in general, is that in the presence of the deceased's brothers and sisters of whatever kind they may be i.e. either consanguine or true or uterine the mother's share shall be reduced from one-third to one-sixth only.²⁹

In the event of wife's or husband's death :

According to the rule of conduct of the jurists in general, if a woman dies leaving behind her husband, father and mother, half the share goes to the husband, one-third of the residue shall be given to the mother and the rest shall be given to the father. Similarly when the husband dies leaving behind his wife and his parents, one-fourth share goes to the wife and one-third of the residue shall be given to the mother and the rest shall pass to the father. If, however, in place of the father the deceased leaves his grandfather, the mother shall get one-third of the whole and, after giving husband's or wife's share, the rest shall go to the grandfather. According to Imam Abu Yusuf, however, in the presence of the grandfather as well, after giving away the shares of the wife or the husband the mother shall be entitled to one-third of the residue and not of the whole property.³⁰

²⁸Ibn Hazm : op. cit., vol. vi, p. 314.

²⁹Al-Jurjani : op. cit., p. 30.

³⁰*Ibid*; Abū Zahra : op. cit., pp. 175-76.

Exclusion and deprivation :

As a rule, the mother is never excluded. She is either entitled to get her *Fard* share of one-sixth and sometimes one-third except when there is something barring her from inheritance. In other words she is entitled, on account of partial exclusion, to the one-sixth share, otherwise she is entitled to one-third, as set forth above. However, the grandmother (whether from father's side or from mother's side) in the presence of the mother is excluded.³¹

Modern Legislation :

Egyptian Law of Inheritance: Mother's *Fard* share is one-sixth when the son or the grandson to the lowest degree is present or more than two brothers and sisters are present. In the circumstance different from this, her share is one-third. Indeed, when there is a husband or the wife of the deceased or the father, after their fixed share, one-third of the remaining estate shall be the fixed share of the mother. (Section 14).

Syrian Law of Inheritance : (1) The son or the grandson, to the lowest degree, of the deceased being alive, or two or more than two brothers and sisters being alive, the mother shall get one-sixth.

(2) In the circumstances other than stated above, one-third shall be given to the mother except when anyone of the husband or the wife or the father is present. In the latter case, one-third of the remaining estate shall be given to the mother. (Section 271).

Tunisian Law : (1) There are three situations of inheritance of the mother :—

One-sixth, when the deceased has the son or the grandson to the lowest degree, or has two or more brothers of any kind (true, consanguine or uterine).

(2) One-third, in the event of there being no one of the persons stated above.

(3) One-third of the remaining estate, after giving away the share to the husband or the wife. There are two conditions for the same. The first is that, among the heirs there are present with the mother, the father, grandfather as well as the husband of the deceased. The second situation is

³¹Abdullah b. Mahmud b. Mawdud.: op. cit., vol. v, p. 89.

that there are present with the mother, the father, grandfather as well as the wife. In these two cases, however, when in place of the father the grandfather is present, then, after giving away the *Fard* share to the wife whatever is left over, the one-third of the same shall be given to the mother. (Section 107).

Moroccan Law of Inheritance : (1) Mother of the deceased is entitled to one-third share, provided the deceased has left no issue or two or more than two brothers. (Section 243).

(2) Mother of the deceased shall be entitled to one-sixth when the deceased has left issue of any kind or two and more than two brothers and sisters of any kind. (Section 244).

Section 294. There are three situations in which the daughter
Inheritance
by daughter inherits from the father:—

1. If she is alone, she shall get half of the estate.
2. If there are two or more than two daughters they shall get two-third of the estate.
3. If the son of the deceased is also alive, then, compared to him, she shall get half the share of the son.

Explanation : If the deceased has only the daughter or daughters they shall get their shares as *Dhawi al-Furud*. If the deceased has a son as well as the daughter she shall inherit alongwith her brother as '*Asbah*.

COMMENTARY

The daughter is one of the *Dhawi al Furūd*. By a daughter is meant the one who is a true daughter of the father or the mother begotten directly in legal wedlock. If the deceased is male and he from his legitimate wife has a daughter she shall be called his true daughter. Likewise, if the deceased is a female, the daughter begotten by her shall be her true daughter. Her share is also fixed in the Holy Qur'an. God says, "If the daughter is one, estate for her is half. If the daughters are more than two for them there is two-third of the estate." (IV : 11).

Inheritance by Daughter under different Schools of Fiqh :

The real daughters of the deceased, (whether the deceased is the father or the mother) when they inherit, occupy, according to the four Imams, one of the three situations as under:—

I. If she is alone, she is entitled to half of the estate.

The Zahriyyah's rule of conduct is also the same.³² But the Shi'ah Imamiyyah differ on the question. Thus, if the deceased left behind only one daughter and one true brother, according to all the Sunni Imams as also the Zahriyyah, the daughter as sharer shall get half the estate and the brother (of the deceased) as residuary (*'Asbah*) the other half. On the contrary, according to Shi'ah rule the daughter shall be entitled to the entire estate.³³ To this writer, the Sunni rule of conduct is in accord with the Holy Qur'an and the Sunnah. (See footnote 23 *supra*).

II. In the case of two daughters and no son, there is a difference of opinion as to how much estate in total shall the two daughters get. There is, however, no difference of opinion if in the above case daughters are more than two.

If there are two daughters and no son the two daughters, according to the assertion of the Prophet's Companions in general, shall divide among themselves two-thirds of the estate. According to the assertion of Haḍrat Ibn Abbas, however, these two daughters shall share in the half as is the half fixed for one daughter. He, in support of his contention, puts forward the Qur'anic verse (11 : 4). Arguing that God has made the mandate of two-third estate being shared among the daughters dependent on more than two, and that what is made dependent on a condition cannot be implemented unless that condition comes into existence. Hence, the entitlement of the daughters, to two-thirds of the estate shall not be given effect to unless they are more than two. But the rule of conduct of the majority of *Sihabah* and all the Imams of the Sunni sects is that the daughters, whether two or more than two, shall share in two-thirds of the estate where there is no son, which stands proved by the Prophet's tradition as narrated by Jābir b. Abdullah that he along with the Prophet was proceeding towards the market when a woman with her two daughters appeared and said, "O Prophet these are the two daughters of Sa'd Bin Rabi' (a respectable *Ṣahabi* of Khizraj tribe) who

³²Ibn Hazm : op. cit., vol. vi, p. 330.

³³Al-Hilli : op. cit., pt. iv, pp. 180, 183-84.

while fighting on your side got killed (*Shaheed*) in the battle of 'Uhad at the hands of the infidels, and the uncle of those two daughters (according to the then prevailing practice among the Arabs when the daughters used to be disinherited) took possession of the whole property of the deceased and left nothing for them. O'Prophet! Do not you see that men do not (in a respectable society) marry the girls who do not possess property and riches". The Prophet told the woman "God shall soon decide the matter". The widow of Sa'd b. Rabi', after waiting for some days, came weeping in his presence again. Her tears became the cause of blessings from God and the last and final decree regarding inheritance got revealed that begins with the words "يُورِثُكُمْ اللَّهُ فِي أَوْلَادِكُمْ" wherein the shares of wives and daughters have been fixed. The Prophet sent words to the brother of Sa'd, "Of the property left by your brother give its two-third to the two daughters and one-eighth to the widow and whatever remains thereafter is yours".³⁴ Accordingly the direction issued by the Prophet explained the revelation that God's saying "أَنْ كُنْ نِسَاءً فَوْقَ اثْنَتَيْنِ" means two or more than two.

The argument of Ibn 'Abbas may be answered thus: In the Book of God under God's dictate "لِلذَّكَرِ مِثْلُ حَظِّ الْأُنثِيَيْنِ" the reference is clearly to the combination of a son and a daughter, in which case it is unanimously held that the son shall get two-thirds and the daughter shall get one-third in the estate. It indicates that a son is equal to two daughters. Thus, the two-thirds of the estate for two daughters, when there is no son alongwith them, gets proved. Therefore, there was no need of a separate Qura'nic text for fixing of two-third share for the two daughters. Indeed, according to this logic, clarification was required for the share of more than two daughters because it could then be well argued that the share is half for one daughter and two-third for two daughters, which implies that the one-sixth share in the estate was added to daughter's share by addition of one daughter; consequently it follows that for each daughter there shall be an increment of one-sixth share, for each additional daughter of the deceased. God, in order to remove this doubt, said, "In the event of more than two daughters their share is two-third" (IV : II) which they

³⁴Al-Baghawi, Hashim b. Ma'sūd al-Farrā (d. 516 A.H.): *Mishkāṭ al-Masabih*, Karachi, p. 264 :

"عن جابر قال جاءت امرأة سعد بن الربيع بابنتيهما من سعد بن الربيع الى رسول الله صلى الله عليه وسلم فقالت يا رسول الله هاتان ابنتا سعد بن الربيع قتل ابوهما معك يوم احد شهيداً و ان عمهما اخذ ما لهما ولم يدع لهما مالا ولا تنكحان الا ولهما مال قال : يقضى الله فى ذلك فنزلت آية الميراث فبعث رسول الله الى عمهما فقال اعطى بنتى سعد الثلثين واعطى ابهما الثمن وما بقى فهو لىك"

ought to divide equally among themselves (provided there is no son). In other words, the Holy Qur'an, expressly lays down the shares of more than two daughters to be limited to two-third of the estate. The same directive of two-third is proved by implication of the Qur'anic text (IV:176), with the further support of the Prophet's Tradition, referred to above.

Irrespective of the argument stated above, the view reported from Ibn Abbas is not free from doubt. It is said that this report from Hadrat Ibn Abbas viz. that "for two daughters the inheritance is half" is "Munkar" (refuted and does not attain proper degree of proof), rather the correct position is that he (Ibn 'Abbas) too, agreeing with the other companions, was convinced of two-third share for the two daughters.³⁵

Shi'ah Imamiyyah :

The Shi'ah Imamiyyah as well agree with the 'Ulama of *Ahl-i-Sunnat Wal Jamā'at* regarding the question of the inheritance of two daughters that the daughters in case of two and more than two shall be entitled to two-third estate,³⁶ in case other heirs of the first category are alive, but no son or son's son.

Zahiriyyah :

The Zahiriyyah's rule of conduct is also the same.³⁷

The third situation for the daughter is that in presence of the sons of the deceased the daughter becomes '*Asbah*' and the daughter gets the half share compared to the son. For example, in the presence of a daughter and a son when there is no other heir, the daughter shall get the one-third and the son shall get the two-thirds of the estate. There is a total agreement on this point.

Modern Legislation :

Egyptian Law of Inheritance : Subject to the provisions of Section 19, *Fard* share of a daughter shall be the half and in case of their being two or more than two, their share shall be the two-third (Section 12).

Syrian Law of Inheritance : Subject to the provisions of Section 277, in case of there being one daughter of the deceased she shall be

³⁵Al-Sarakhsi : op. cit., vol. xxix, pp. 139-40; Al-Jurjani : op. cit., p. 21; Ibn Qudamah al-Maqdisi (d. 620 A.H.): *Al-Mughnī*, Cairo, 1348 A.H. vol. vii, p. 8.

³⁶Al-Hilli : op. cit., vol. ii, pt. iv, p. 186.

³⁷Ibn Hazm : op. cit., vol. vi, p. 310.

entitled to half of the estate and in case of there being two or more than two they shall be entitled to two-thirds of the estate. (Section 296).

Tunisian Law of Inheritance : There are three situations of the true daughters :—

- (i) When she is alone, she shall get the half.
- (ii) When they are two or more than two they shall get two-thirds.
- (iii) When there is a brother with them as well, they shall inherit on the basis of "for the male there is, the share equal to that of two females (Section 103).

Pakistan's Law :

In the Pakistan Muslim Family Law Ordinance VIII of 1961, a basic difference has been made in the inheritance for the daughter because of providing shares to orphan grandsons and grand-daughters equal to their deceased father from the estate of their grandfather. Therefore, at the time of fixation of daughter's share, irrespective of the principles of inheritance laid down by the Qur'an and Sunnah and the four Imams, their deceased father is to be considered as alive at the time of the fixation of shares in and division of inheritance. (For detail see Chapter XXXIX on "Exclusion & Deprivation" *infra*).

Section 295. There are six situations in which son's daughter gets the inheritance:—

1. When there is one she shall get half of the estate.
2. When there are two or more than two, they shall distribute among all of them two-thirds of the estate, in case there is no daughter.
3. When there is a daughter of the deceased she shall get half of the estate, and the deceased's son's daughter shall get one-sixth of the estate, so that the two-third share in inheritance for daughters may thus be made up.
4. When there are two or more than two daughters of the deceased, the deceased's son's daughter shall not be entitled to inherit.
5. Except, where there is a grandson of their degree or of lower degree than theirs, that shall make the deceased's

son's daughters as '*Asbah*, and the residue of the estate shall be divided among them (the grand-son and grand-daughter) according to the rule of "Double to the male of that of a female".

6. In the presence of the son of the deceased the son's daughter, as opposed to daughter, shall not inherit.

COMMENTARY

The son's daughter in the absence of daughter of the deceased is like his daughter in three situations.³⁸ In the event of there being no son or there being one daughter or there being no daughter or son, the son's daughter inherits like the daughter.

The Four Sunni Schools :

According to the four Imams there are in all six situations in which son's daughter gets the inheritance:—

- (i) Where there is no son or daughter and there is son's daughter, she shall get half of the estate.
- (ii) Where there is no son or daughter and there are two or more than two son's daughters, they shall get two-thirds share in the estate.
- (iii) Where there is no son and there is a daughter besides one or more than one son's daughter, the daughter shall get half share in the estate and the son's daughter (one or more than one), shall get the one-sixth share. That is to say, in the presence of one daughter the grand-daughters, even more than one, shall get one-sixth share, which shall be divided equally between them. Same is the assertion of Haḍrat Abdullah Ibn Mas'ud.³⁹

Zahiriyyah : Same is the rule laid down by Ibn Hazm Zahiri.⁴⁰

Shi'ah Imamiyyah: According to Shi'ah Imamiyyah the issues of the son, whether male or female (son or daughter), being the substitutes of that son

³⁸ Al-Jurjani : op. cit., p. 22 :

”بنات الابن كبنات الصلب“ . . . ”وبنات الابن كبنات الصلب في ثبوت تلك الاحوال لثلاث“

³⁹ *Ibid*, p. 22.

⁴⁰ Ibn Hazm ; op. cit., vol. vi, p. 231.

shall get the same share that belonged to their father.⁴¹ The division shall thus, according to them, be *per stripe* (and not *per capita*, i.e. per root and not per head). For instance, a person dies leaving behind one issues from one pre-deceased son and four sons from the other son. The estate shall be divided into two equal parts: one half shall go to the one issues and the other half shall be distributed equally among the four issues i.e. the same shares as their father would have inherited, had he been then alive.

- (iv) When there are two daughters and one or more than one grand-daughter of the deceased, the grand-daughter shall not inherit, because the daughters, in accordance with the Holy Qur'an (IV : 11) and Prophet's Tradition, shall receive their two-third share in the estate.

Hadrat Ibn 'Abbas on this question says that the directive regarding two daughters is the same as regards one daughter. Hence the two daughters shall get half and (therefore) the grand-daughter shall get the remainder one-sixth. But this view does not seem to be correct or authentic as already discussed in the foregoing Section regarding the daughter's inheritance.

- (v) Where alongwith the son's daughter there is a grandson of the deceased (of howsoever low in degree) and there is no son of the deceased, the grandson shall make the son's daughter into a residuary ('Asbah) and the estate shall be divided between them on the principle of "For male twice that for a female". If the deceased had left two daughters and one grandson and one grand-daughter, in that event, after giving two-thirds to the daughters of the deceased, the remaining, on the principle of a male's equal to two females, shall be divided between the grand-daughter and the grandson.

Hadrat Ibn Mas'ud, however, differs on this question. According to him, in the presence of two daughters of the deceased, the grandson shall not make the grand-daughter into 'Asbah (residuary); rather the grandson shall get the entire estate. The grand-daughter shall get nothing from the estate, because the remaining estate in that case, if divided (on the principle of for a male twice that of a female) between the grandsons and grand-daughters, the daughters' combined share (including the grand-daughter) shall exceed to more than two-thirds of the estate. But according to the Prophet's saying the daughters (including grand-daughters) are not entitled to more than two-third. But

⁴¹Al-Tusi, Muhammad b. Al-Hasan (d. 460 A.H.) : *Al-Istibṣār*, Najat, 1376 A.H., 1956 A.D., vol. ii, p. 166; Al-Hilli : op. cit., vol. ii, pt. iv, p. 187.

this statement of Hadrat Ibn Mas'ud does not appear to be convincing that excess in *farq* (obligatory) shares is forbidden. In the case stated above the excess is attributable to the shares because of *Asubat* and not in the ordained shares and the former is not forbidden. The afore-mentioned tradition of the Prophet, in fact, explains the text of the Qur'ān, which is revealed in connection with the shares of *Dhawi al-Furūd*.⁴² Supposing the deceased leaves only two daughters and there is no 'Asbah. In such an event the daughters shall get the remaining one-third share also by the doctrine of *Radd* (Return). Can it be then said in any manner that the dictate of the Holy Qur'an as regards excess, as argued by Ibn Mas'ud, has been contravened? Certainly not.

Zahiris : Ibn Hazm Zahiri as well agrees with the Hanafis and other Imams on this point.⁴³

- (vi) Where the son of the deceased is present, the son's daughters do not inherit at all.

The son being the 'Asbah takes the entire estate because the one remote stands excluded in presence of the one closer. As against this (in the event of there being no son) a grand-daughter's right in presence of a daughter does not lapse, because the daughter being *Dhū Fard* (Sharer) takes her due share, and for completing the two-thirds for the females the grand-daughter is held entitled to the one-sixth share. Thus, the two-third fixed for the daughters (including the grand-daughter) gets completed in accordance with the Holy Qur'an and the Prophet's traditions.⁴⁴

Modern Legislation :

Egyptian Law of Inheritance : Subject to the provisions of Section 19 the aforestated share for the grand-daughters shall be obligatory (*Farq*) when no daughter or grand-daughter of a higher degree than them (the inheritors) is present. But in the presence of a daughter or a grand-daughter of a higher degree, they shall get one-sixth ($1/6$) Fard share though in number they (the grand-daughters) be one or more. [Section 12 (6)].

Syrian Law of Inheritance : Section-277 (2): Where there is no daughter or grand-daughter of a higher degree present, the daughters of the son (grand-daughters) shall be given the afore-stated share i.e. one-sixth in case of their being one and in case of their being more than one, two-third of estate.

⁴²Al-Sarakhsi : op. cit., vol. xxix, p. 140; Al-Maqdisi : *Al-Mughni*, vol. vii, p. 9; Al-Jurjani, p. 22.

⁴³Ibn Hazm : op. cit., vol. vi, p. 130.

⁴⁴Al-Jurjani, p. 23.

When there is present the deceased's (only) one daughter or (only) one grand-daughter of higher degree she shall get the half. [Section 277(3)].

Tunisian Law of Inheritance : Under Section 104 of the Tunisian Law the six situations regarding grand-daughter's inheritance have been stated as codified in the Section hereinabove.

Moroccan Law : In the law of Morocco. the situations of getting half or one-sixth share, as the case may be, of inheritance by grand-daughter have been laid down under Sections 242 and 244 of the Law of inheritance.

Pakistan Law :

Under Pakistan Muslim Family Laws Ordinance, 1961, a change in the situations of grand-daughter's inheritance has been brought about. Here she does not get the estate as grand-daughter; rather she gets that share which her deceased father would have got had he been alive. For further discussion on this point see Chapter's XXXIX *infra*.

Section 296. In the event of there not being a son (of howsoever low in degree) or the father (of howsoever high in degree) of the deceased:—

Inheritance by
full sister

1. If one sister is there she shall get half of the estate.
2. If there are two or more than two sisters they shall get two-thirds of the estate.
3. In the presence of a brother of the deceased the sister shall as well become an '*Asbah* (Residuary) and shall get the share in accordance with the rule 'A male shall get the double of a female's share.'
4. In the presence of a daughter or son's daughter, after they get their shares the sister gets the residue.

COMMENTARY

That sister is called the full, true or real sister whose parents and the parents of the deceased are the same.

A Full sister's Inheritance :

A full sister's right to inheritance arises in the following situations:—

- (i) If a son (of howsoever low in degree) or the father (of howsoever high in degree) of the deceased is not present and among

the heirs there is present a sister, she shall get half of the estate as provided in the text of the Holy Qur'an (IV : 176).

Here 'sister' means both the full as well as the consanguine sister in as much as the deceased is the male. However, there is a separate law regarding the uterine sister as stands established from the Holy Qur'an (IV : 12) See Section 298 *infra*.

- (ii) If there is no son (of howsoever low in degree) nor the father (of howsoever high in degree) of the deceased, and only two sisters are his heirs, both of them shall get two-third share in the estate as stated in the Holy Qur'an (IV : 176). The same provision shall apply to more than two sisters.

Exclusion : The sister gets excluded in the presence of the son or grand-son (of howsoever low in degree) of the deceased. Likewise, she gets excluded in presence of father of the deceased. All jurists agree on this. She does not, however, get excluded in the presence of the grandfather, except Imam Abu Hanifah, according to whom she gets excluded from inheritance in the presence of grandfather as well.

- (iii) The sister becomes an '*Asbah*' with her full brother and she shall, then, get her share in accordance with the rule "Male shall get the double compared to a female."
- (iv) If there is a full sister alongwith the daughter or grand-daughter, then after giving the share to the daughter or grand-daughter (one or more than one as the case may be), the sister shall get the residue. In this connection, there are two different views as below:—

- (a) The first point of view is that sisters, alongwith daughters, shall become '*Asbah*'. After the daughter and grand-daughter get their shares, the sister shall take it whatever shall be the residue.

This is the view of Abdullah Ibn Mas'ud and Zaid b. Thabit. Same is the practice adopted by the four Imams. The final opinion of Ma'adh b. Jabal, Abu Musa al-Ash'ari and Salman is the same and the same view is reported from Hadrat 'Umar also.

- (b) The second point of view is that after giving away the share to the daughter or grand-daughter, the residue is for the male '*Asbah*' only such as (brother, nephew, uncle, uncle's son and others).

Thus, in the presence of daughter or grand-daughter the sister is absolutely no heir in the same way as in the presence of a son the sister does not get any thing.

The exception is that when no male '*Asbah* of the deceased exists, only then, after giving away the share to the daughter or the grand-daughter of the deceased, the full sister shall get whatever is the residue. If there is no full sister the consanguine sister shall get the same. This is the opinion of Ibn 'Abbās as well as of Salman and Ishaq Ibn Rahwaih. Same was the initial view of Ibn al-Zubair as well.

Rationale :

The Jurists, who are convinced that the daughter is an '*Asbah* along with sister, base their argument on the tradition reported by Ibn Mas'ud viz; "It is narrated from Huzail b. Shurahbil that he said that Abu Musa al-Ash'ari was asked regarding the inheritance of daughter, grand-daughter and the sister. He replied that after giving half to the daughter, the residue should be given to the sister. When Ibn Mas'ud was informed of the assertion and was questioned about it, he replied, "If I say the same (What Abu Musa has said), I shall be among those who led astray and shall not be counted of those who are among the correctly-guided ones. Hence my decision shall be according to what the prophet has said. 'Half is for the daughter and one-sixth is for the grand-daughter, so that the two-third may get completed, and the residue is for the sister'.⁴⁵ In His Book, God has said, "For the male is double that for a female". Thus it stands proved from this verse that God, in the presence of brother, has not specifically stated the share for the sisters, nor of brothers. She becomes '*Asbah*, as in relationship to the deceased, they stand equal.

Shi'ah point of view :

According to Shi'ah Ja'fariyyah if the sister and the uncle are among the heirs, the sister shall take the entire estate and the uncle shall get nothing as he belongs to the third rank of the heirs. He shall be excluded. (See Section 287 *supra*).

⁴⁵ Al-Baghawi : op. cit., p. 264 :

”عن هذيل ابن شرحبيل قال سئل ابو موسى عن ابنة و بنت ابن واخت فقال للبنت النصف والاخت النصف وات ابن مسعود فيتايعني فسئل ابن مسعود واخبر يقول ابى موسى فقال لقد ضللت اذن وما انا من المهتدين اقضى فيها بما قضى النبي صلى الله عليه وسلم للبنت النصف ولابنة الابن السدس تكملة الثلثين وما بقى فلاخت فاتيها ابا موسى فاخبرنا بقول ابن مسعود فقال لا تسئلوني مادام هذا الخبر فيكم“ رواه البخارى -

Zahiri's Rule :

The rule of conduct of Imam Ibn Hazm is that the son or daughter or grand-daughter or grandson, howsoever low in degree, of the deceased, when present, shall exclude all the full, consanguine and uterine sisters of the deceased. No sister, in the existence of these persons, shall be the heir. After giving the share to the said issue, the residue shall be given to the male '*Asbāt*', for example the brother, the nephew, the uncle, the uncle's son. But, with the issues of the deceased and the issue of the issues, male or female, if no aforesaid '*Asbah*' exists in that case the residue shall be given to the full or consanguine sister or sisters, as the case may be.⁴⁶

Conclusion :

It is said that the brother with the sister, on the basis of the tradition narrated by Ḥaḍrat Ibn 'Abbās being held as '*Asbah*' will exclude the sisters. In answer to this, on behalf of the '*A'immah*' in general, the Prophet's Tradition "اجعلوا الاخوات مع البنات عصبة" and the above stated tradition narrated by Huzail Bin Shurahbil may be put forward, wherein sisters with daughters being held as '*Asbāt*' have been recognized as heirs.

In the '*Ummah*' (Muslim Community), (besides the Shi'ah), the unanimous view which has continuously remained in vogue is that the sister with the daughter is held to be the heir as '*Asbah*' provided the deceased is '*Kalalah*' i.e. he has no son or the father existing. In case there are sister and brother, both shall inherit on the principle of "A Male to get twice the share of a female".

Exclusion :

If the deceased's son or the grandson, howsoever low in degree, is in existence, the sister gets excluded. Likewise, if the father of the deceased is in existence, the full sister gets excluded whether the son or the daughter exists with her or not. Indeed, there is a difference of opinion regarding the sister getting excluded in the existence of the grandfather. According to one group of jurists, she shall get excluded like the father. Whereas according to another group of jurists she shall not get excluded in the existence of the grandfather. In Egyptian law, the rule has been adopted that the sister shall get the inheritance in the existence of the grandfather.⁴⁷

Section 297. There are six situations of of Allati (consanguine)

Inheritance by con- sister's getting the inheritance:—
sanguine sister

⁴⁶Ibn Hazm : op. cit., vol. vi, p. 313.

⁴⁷Umar Abdullah : *Aḥkām al-Mawāriṭh*, p. 175.

1. Where she is one she shall get half of the estate.
2. Where they are two or more, they shall get two-third, if the full sisters do not exist.
3. Where there is one full sister and one consanguine sister, the full sister shall get the half and the consanguine sister shall get one-sixth and thus the two thirds shall be completed.
4. When two full sisters exist the consanguine sisters shall not be the heirs.
5. The consanguine sisters shall become '*Asbah* in the presence of a consanguine brother and get the estate on the basis of half of what his brother gets.
6. Consanguine sisters with true daughters and grand-daughters become the '*Asbah*.

Explanation : Brother or sister, whether full or consanguine, in the existence of the son and grandson of the deceased (of howsoever low in degree) and in the existence of the father of the deceased, do not inherit.

COMMENTARY

'*Allāti* or consanguine sister is the one who is related from father's side, not from mother's side. The directive regarding '*Allāti* sister of the deceased is to be found in the Qur'anic verse "They ask thee of a legal decision. Say: *Allāh* directs (thus) about those who leave no descendants or ascendants as heirs. If it is a man that dies, leaving a sister but no child, she shall have half the inheritance: If (such a deceased) was a woman, who left no child, her brother takes her inheritance: If there are two sisters they shall have two-thirds of the inheritance (between them). If there are brothers and sisters (they share) the male having twice the share of the female (IV: 176). Thus, as the rule is applicable to the inheritance of full sister of the deceased so shall it be applicable to the '*Allāti* (consanguine) sister of the deceased. Indeed, in the matter of inheritance the full sister have precedence over the consanguine sister, because the full sister compared to consanguine sister is more closely related to the deceased and under the principle of "Nearer excludes the remote" excludes the '*Allāti* sister.

Situations of Allati (Consanguine) Sister's Inheritance :

There are seven situations of '*Allāti* (consanguine) sisters getting the inheritance. The five situations are the same that have been stated regarding the full sister. But two situations are in addition to those five. All these seven situations are summarised as under :

1. If the deceased left only one consanguine ('*allati*) sister she shall get a half.
2. Where no full sister of the deceased exists but there are two or more consanguine sisters, they shall be given the two-third. All the consanguine sisters shall divide this two-third share among them. This directive is under the Qur'anic mandate which has already been stated regarding the full sister, which equally applies to consanguine sister.
3. In the existence of one full sister the consanguine sister shall get one-sixth, so that the two-thirds may get completed. As two and more than two sisters together get two-thirds and the full sister having already taken her half share, the one-sixth being the residue, shall be given to the consanguine sister, so that the two-thirds may thus be completed.
4. The consanguine sister with two full sisters shall not be the heir as the full sisters take the complete two-thirds which is the right of the sisters; thereafter no share shall remain for the '*Allāti* (consanguine) sister.
5. If, with the consanguine sister, there exists the consanguine brother, the brother shall make her sister '*Asbah*. After the full sisters take their two-thirds the estate that is left, the consanguine brother and sister divide it between themselves on the principle of "the male having twice the share of the female."
6. In the existence of the daughter or grand-daughter of the deceased, the consanguine sisters shall become the '*Asbah*. Hence, after the daughter or grand-daughter takes her share, the residue shall be taken by the consanguine sister as '*Asbah*. This is the view of the Companions in general. Indeed, Haḍrat Ibn 'Abbās does not hold the sisters alongwith the daughter or grand-daughter as '*Asbah* as has already been discussed in connection with the inheritance of full sister.
7. The consanguine sister like the full sister, in the existence of the son or grandson or the father of the deceased, shall stand

excluded from the inheritance. According to Imam Abu Hanifah the same shall be the rule when (instead of the father) the grandfather of the deceased exists. Besides, the consanguine sisters as well are excluded in the existence of the full brother of the deceased.⁴⁸

Modern Legislation :

Under the inheritance laws of Egypt (Section 13) of Morocco (Sections 239 and 242) the rules relating to the inheritance of 'Allati (consanguine) sisters have been provided.

Section 298. There are two situations of the uterine (*Akhyāfi*) brother's and sister's right of inheritance:—
Inheritance of
uterine (*Akhyāfi*)
brother and sister

When there is no issue of the deceased or of his son, neither there is the father nor the grandfather:—

- (i) One uterine (*akhyāfi*) brother or sister shall get one-sixth.
- (ii) Two or more of them shall get the one-third which shall be divided equally between male and female.

COMMENTARY

Akhyōfi (uterine) brothers or sisters are the brothers and sisters who are related to the deceased through the mother and not through the father. They are also called "Awlād al-Umm", the mother's issues. *Akhyōfi* (uterine) brother and sister are also included in *Dhawi al-furūd*, because their shares as well are fixed in the Qur'an, "If the man or woman whose inheritance is in question has left neither ascendants nor descendants but has left a brother or a sister, each one of the two shall get a sixth, but if more than two, they share in a third". (IV:12).

In connection with uterine (*akhyōfi*) sister's right of inheritance it is written in *Fatāwā 'Ālamgiri* that for a uterine (*akhyōfi*) sister it shall be one-sixth share in the estate of the deceased and for two or more it shall be the one-third share, (ref. *al-Ikhtiyār*).⁴⁹

⁴⁸ Al-Jurjani ; op. cit., pp. 27-28.

⁴⁹ *Fatāwā 'Ālamgiri*, Dewband, vol. iv, p. 405.

Situations of inheritance of uterine (*akhyāfi*) brothers and sisters :

There are four situations of uterine (*akhyāfi*) brother or sister getting the inheritance as under:—

1. Where the issues of the deceased (son, daughter) or the issues of his son are not there, neither is there the father nor the grandfather, but there is one uterine (*akhyāfi*) brother or sister, his or her share shall be the one-sixth of the estate of the deceased.
2. When one uterine (*akhyāfi*) brother and one uterine (*akhyāfi*) sister are there, each of them shall get the one-sixth share (both of them shall be the equal sharers in one-third).
3. Where two or more uterine (*akhyāfi*) brothers or sisters are there, for all of them, in total, is the one-third share in the estate, which shall be divided equally among them.
4. Likewise, where the *akhyāfi* sisters are also there with the *akhyāfi* brothers, all of them shall be entitled equally in the one-third share. No distinction shall be made in the shares of male and female, as the Holy Qur'an decrees thus : "When they (*akhyāfi*) brothers and sisters are more than one, they all are the sharers in one third", (IV : 12), provided that there is no son, daughter, the son's issues or the father or grandfather of the deceased.

Exclusion :

There is a consensus that the uterine (*akhyāfi*) brother and sister get excluded in the following two situations :

1. When the son, daughter, or son's issues of the deceased of howsoever low in degree are alive.
2. When the father or grandfather of the deceased of howsoever high in degree is alive.⁵⁰ On this question there is the consensus of the entire 'Ummah, including the Zahirīyyah.⁵¹ and the Shi'ah Imāmiyah.⁵²

Modern Legislation :

In the inheritance laws of Egypt (Section 10), of Syria (Section 267), of Tunisia (Section 100 and 106) and of Morocco (Section 244) the shares of

⁵⁰ *Fatāwa 'Alamgiri* : op. cit., vol. iv, p. 405.

⁵¹ Ibn Hazm : op. cit., vol. vi, p. 310.

⁵² Al-Hilli : op. cit., vol. ii, ppt. iv, p. 187.

the uterine brothers and sisters (*akhyāfi*) have been provided. However, the Tunisian law has made a significant departure from the Qur'anic law where-in it purports to treat uterine sisters at par with real and consanguine sisters.

Section 299. The grandfather of the deceased, in the absence of the father, shall be entitled to inheritance similar to that of the father, except in the following cases:—

Inheritance by
grandfather

- (1) Father's mother in the existence of the father stands excluded. She shall not be excluded by the grandfather.
- (2) When the deceased leaves any one of the parents and the spouse, after giving away the share of the spouse, the mother shall get one-third of the remainder. But in place of the father if there is the grandfather, the mother shall get one-third of the entire estate.
- (3) The full or consanguine brother, in the existence of the grandfather, shall not be excluded and the grandfather shall get the share equal to that of the brother.

COMMENTARY

“*Jadd* (grandfather) means” the real grandfather (*jadd ḥaqiqi*) i.e. the grandfather between whom and the deceased no female intervenes, only the male intervenes, as father of the father of the deceased in his lineage upward. Consequently, the father of the mother (maternal grandfather) shall not be the real “*jadd*” (grandfather). He shall rather be called” the unreal grandfather *jadd Ghayr ḥaqiqi*.”

When the word *jadd* is spoken for the maternal grandfather, it is accompanied by the word *fāsid* or unreal. It is, thus, written in “*Al-Sharifiyyah*” (p. 19) that the real grandfather means that grandfather who is the father of the father of the deceased and in referring him to the deceased the mother does not intervene. If in referring him to the deceased the mother intervenes, the grandfather is the unreal one. The unreal grandfather is not included in “*Dhawi al-Furūd*. In the absence of the grandfather, the grandfather's father, and in his absence the father of the grandfather's father shall be the substitute i.e. the father of the father or the father of father of the father and so on.

If the grandmother contracts another marriage, her new husband shall not be the grandfather, neither as *Dhawi al-Furūd* nor as *Dhawi al-Arhām*. He shall in no event inherit.

Situations of grandfather's inheritance :

Like that of the father there are three situations as well of grandfather's inheritance:—

1. Being merely the *Dhu Fard*;
2. Being *Dhu Fard* and the '*Asbah*;
3. Being merely the '*Asbah*.

As *Dhu Fard* : The grandfather as *Dhu Fard* only shall get one-sixth share, when with him there is alive the male issue of the deceased.

As *Dhu Fard* and '*Asbah*: The grandfather as *Dhu Fard*, shall get the one-sixth share and as '*Asbah*, after the shares have been given to all other *Dhawi al-furud*, shall get the residue when with him there is alive only the female issue of the deceased. That is, if some male issue of the deceased is alive, the grandfather shall not inherit as *asbah*.

As *Asbah* only: When no issues of the deceased exist or such issues of the issues exist who because of not being *Dhawi al-Furūd* or '*Asbah* can not be the heirs such as daughter's daughter's son or her daughter, or are otherwise disinherited, the grand-father, then, being the sole '*asbah* shall inherit the entire estate.

In case, of all the heirs, only the grandfather and the grandmother exist, the grandfather, after the one-sixth share is given to the grandmother, shall get the remainder. In such an event it is essential that the grandmother and the grandfather are of the same degree. Indeed, the grandmother of a remote degree than the grandfather, in the existence of the grandfather, shall get excluded.

Grandfather as substitute of the father :

In certain circumstances, when father is not existing the grandfather is his substitute. which stands proved by the interpretation of several verses of the Qur'an (VII : 27, XXII : 78, XII : 38), and the traditions of the Prophet.⁵⁴ Besides, there is consensus of the Companions of the Prophet that in the event of the father not being alive the grandfather is like the father. There is also the consensus of the Companions on the point that in 'Inheritance' the grandfather is like the father. In fact, the use of the word "اب"

⁵³ *Fatāwa 'Alamgiri* : op. cit., vol. iv, p. 403.

⁵⁴ قال رسول الله صلى الله عليه وسلم "ارثوا بنى اسماعيل فان اباكم كان راسياً" -

(father) for the grandfather in the holy Qur'an depicts Arab custom. It can not be the absolute proof for the right of grandfather like that of father in inheritance.

Haḍrat Abu Bakr, Haḍrat Ibn 'Abbās and Haḍrat Ibn Zubair say that the grandfather in the absence of the father is his substitute. There is reported no disagreement on this from any of the Companions of the Prophet.⁵⁵ Yet inspite of the fact that grandfather in inheritance is like the father he is different from the father in four situations, namely:—

1. The father in no event is excluded from getting the inheritance. Consequently when there is no impediment for him to get the inheritance no other heir can exclude him from getting his share. The grandfather, however, gets excluded by the presence of the father. In the same manner, the closer grandfather excludes the remote grandfather (ancestor).
2. The father's mother shall not be the heir with the father but with every grandfather his father's mother is the heir. But if there exists the grandfather of the deceased (father having died) and with him the mother of the father of the deceased as well exists in that case she shall be the heir.
3. When out of the parents and the husband or the wife (as the case may be) of the deceased if one exists, after giving away the share of the husband or wife, the mother shall get one-third of the remaining estate. She shall not get one-third of the entire estate. If in place of father the grandfather exists the mother shall then get one-third of the entire estate, as the mother of the deceased compared to grandfather stands closer to the deceased.⁵⁶ However, Imam Abu Yusuf, even in such a case, holds that the mother shall get one-third of the remainder.
4. The 'Ulamā are agreed on the point that, in the existence of the father, all kinds of brothers and sisters of the deceased shall get excluded by him. If, in his place, the grandfather exists, only the uterine (Akhyāfi) brothers and sisters shall get excluded. There is consensus on this point. Indeed, there is disagreement on the exclusion of consanguine ('allāti) brothers and sisters in presence of grandfather. One group of the Companions consisting of

⁵⁵ Al-Bukhari : op. cit., vol. ii, p. 998.

⁵⁶ Al-Jurjani : op. cit., p. 19.

Ḥaḍrat 'Ali, Zaid b. Thābit and Ibn Mas'ud holds that the real and consanguine brothers as well with the grandfather are the heirs, if the deceased has no issue. The same view has been adopted by Imam Mālik, Shafī'i, Ahmad b. Hanbal, Abū Yusuf, Muhammad b. Hasan al-Shaybāni, Qāḍī Ibn Abi Laila and Ibn Shabrumah. Imam Abu Hanifah has a different view. According to him, the rights of all kinds of brothers and sisters, including *Akhyāfi* brothers and sisters, in the presence of grandfather, shall lapse⁵⁷ as is the case with the father.

It is written in "*Al-Sharifiyah*" a noted commentary of "*Al-Sirajiyah*" that there is the assertion of Abu Bakr and other Companions of the holy Prophet comprising of Ibn 'Abbas, Ibn Zubair, Ibn 'Umar, Hudhaifah b. Al-Yaman, Abu Sa'id Khudri, 'Ubai b. Ka'ab, Abū Musa al-Ash'ari and Ḥaḍrat Ayesha and others that the true and consanguine brother and sister are not the heirs alongwith grandfather as they are not the heirs alongwith the father. The grandfather takes the entire estate like the father. Same is the assertion of Imam Abū Hanifah as stated earlier. The assertion of most of the successors of the Companions comprising of Shuraih, 'Ata, Urwah b. al-Zubair, Umar b. Abdul Aziz, Hasan al-Baṣri and Ibn Sirin is also the same. In its support, the assertion of Ḥaḍrat Ibn 'Abbas is also quoted by way of argument that he said, "Zaid Bin Thabit does not fear God. He holds grandson to be the substitute of the son but does not hold grandfather to be the substitute of the father". He means to say that the proximity of relationship that the grandson compared to brothers has of being closer to the deceased, the same is the proximity of relationship of the grandfather, i.e. in both of them the basis of inheritance is common. Consequently the directive regarding 'excluding the brothers should be the same for both of them. Thus, as the grandson in the absence of the son excludes the brother, so the grandfather in the absence of father should exclude the brother.⁵⁸

Imam Sarakhsi in his noted work, "*Al-Mabsu*" has stated the same to be the view of Ḥaḍrat Abu Bakr, Ḥaḍrat Ibn 'Abbās, Ḥaḍrat Ayesha, Ubai b. Ka'ab Abu Musa al-Ashari, 'Amrān Ibn al-Hasin, Abu Da'ud, Abdullah b. Zubair and Mu'adh b. Jabal. He has, however, stated about Ḥaḍrat

⁵⁷*Ibid*; Abū Zahra : op. cit., p. 176; Umar Abdullah : op. cit., p. 193.

⁵⁸Al-Jurjani : op. cit., p. 82.

'Umar that he on this point could not form any opinion till the last moment. As against this, the assertion of Ḥaḍrat Ali b. Abi Tālib, Zaid Bin Thābit and Abdullah Ibn Mas'ud and most of the Companions is that the grandfather, in presence of the issues of the deceased is like the father, but when the issues do not exist, but there are with the grandfather true or consanguine brothers of the deceased, the grandfather shall not, like the father, exclude them. Consanguine sisters and brothers alongwith him shall be the heirs. Indeed the grandfather shall exclude the uterine (*akhyāfi*) brothers and sisters.⁵⁹ This is followed by Abu Sufyan Thawri and amongst the Hanafis by Imam Abu Yusuf and Muhammad b. Al-Hasan Al-Shaibani and by Imam Malik and Imam Shafi'i.

Imam Ahmad b. Hanbal agrees with Imam Malik, Shafi'i and Imam Muhammad and is convinced of the division of estate between grandfather and brothers.⁶⁰ The Zāhiriyyah, on this question, adopt the rule of conduct of the first mentioned group of the Companions⁶¹ and agree with Imam Abu Hanifah that grandfather excludes all kinds of brothers of the deceased. According to Shi'ah *fiqh*, the grandfather and the brother belong to the same category. They shall thus be the heirs together. But, the word *Jadd*, grandfather, according to them, is used both for paternal as well as maternal grandfathers.⁶²

Conclusion :

The verdicts (*Farāwās*) were being given by the Hanafis on the basis of the assertion of Imam Abu Hanifah for a pretty long time, but in the recent past the assertion of Ṣāhibayn (Abu Yusuf and Muhammad al-Shaybani) has been adopted. The rule of conduct of Ṣāhibayn and the three Imams (Mālik, Shafi'i and Ahmad b. Hanbal), according to this writer as well, is preferable. The above Section has been codified in accordance with the same.

Modern Legislation :

In the Inheritance Law of Egypt (Sections 9, 21, 22), of Tunisia (Sections 108, 109), of Morocco (Sections 250, 251) have been framed in accordance

⁵⁹Al-Sarakhsi : op. cit., vol. xxix, pp. 179-80; Al-Jurjani : op. cit., p. 84.

⁶⁰Al-Maqdisi, Ibn Qudamah : op. cit., vol. vii, p. 67.

⁶¹Ibn Hazm : op. cit., vol. vi, p. 343.

⁶²Al-Hilli : op. cit., vol. ii, p. 188.

with the view whereby the grandfather does not exclude the real or consanguine brothers.

Section 300. (1) Paternal grandmother and maternal grandmother shall get one-sixth of the estate either they be one or several provided they all be true and belong to the same degree.

(2) In the existence of the mother all grandmothers of every kind shall stand excluded.

(3) Paternal grandmother shall get excluded by the father and so by the grandfather. Indeed, the father's mother (to the highest degree) shall not be excluded and shall get the inheritance with the grandfather.

COMMENTARY

In the Arabic language the word "*Jaddah*" (grandmother) is spoken for both the 'paternal grandmother' and the 'maternal grandmother' of howsoever high in degree they may be. They are included in Dhawi al-Furud.

The true grandmother is that grandmother in whose relationship to the deceased no such man intervenes who stands between two women. If the aforesaid intervention is there, the *Jaddah* shall then be called the *Jaddah fasidah*,⁶³ as the mother of the father of the mother of the deceased or the mother of that mother. Thus in the terminology of the law of inheritance that paternal grandmother (or the maternal grandmother) is called *Jaddah Sahihah* in whose relationship with the deceased the father of the mother does not intervene as the mother of the mother of the deceased (of howsoever high in degree she may be). In other words, that *Jaddah* is called *Jaddah Sahihah* who is related to the deceased through some '*Asbah* (Residuary) or through some *Dhu Fard* (Sharer). But the *Jaddah* who is not related to the deceased through some '*Asbah* or some *Dhu Fard*, she shall not be the heir, according to the jurists' verdict. The father of the mother (maternal grandfather) is, therefore, never an heir as he is neither the '*Asbah* nor '*Dhu Fard*'. Likewise, the *Jaddah* who is related to the deceased through him she shall not be the heir. Hence, the mother of the father of the deceased or the mother of the mother of the deceased, of howsoever high in degree they may be, shall be the heirs.

⁶³Al-Jurjani : op. cit., p. 32.

In the light of the aforesaid elucidation, 'Jaddah' is held to be of two kinds: *Saḥīḥāḥ* (real) and *Fāsidah* (unreal). *Jaddah Saḥīḥās* is included in *Dhawi al-Furud*, whereas *Jaddah Fāsidah* is included in the second degree of *Dhawi al-Arham*.

When the father does not exist one-sixth share is fixed for *Jaddah Sahihah* whether one or more. In the event of their being more than one they shall divide the one-sixth share equally among themselves, provided they, in the degree of relationship, are equal and are not excluded on other grounds. If there exists a maternal grandmother of the deceased being of the same degree as that of the deceased's paternal grandmother, the maternal grandmother as well shall become co-sharer with the paternal grandmother in that one-sixth share.⁶⁴

If the maternal grandmother of closer relationship of the deceased is alive and there is the paternal grandmother of remote relationship of the deceased, the paternal grandmother shall be excluded. For instance, the maternal grandmother is of the first generation and the paternal grandmother is of the second generation, the paternal grandmother, in such an event, shall be excluded.

If the father of the mother of the deceased exists the maternal grandmother shall be excluded. Likewise, if the paternal grandfather of the deceased exists, the paternal grandmother shall be excluded but father's mother, father's maternal grandmother, father's mother's maternal grandmother and father's maternal grandmother do not get excluded in the existence of the paternal grandfather.

The author of "*Al-Sharifiyah*" under the heading *أحوال الجدة* "أحوال الجدة" has written that *Jaddah* shall be entitled to one-sixth, whether she is the mother of the father of the deceased or is the mother of the mother of the deceased i.e. whether she is the paternal grandmother or is the maternal grandmother, when there does not exist the mother of the deceased, whether these paternal grandmothers or maternal grandmothers be more than one. Indeed, regard shall be had of the degree of relationship among them.⁶⁵

Modern Legislation :

Egyptian Law of Inheritance: True *Jaddah* (grandmother) are the mother of the father, the mother of the mother or the mother of paternal grandmother of howsoever high in degree they may be. One or more *Jaddah* shall

⁶⁴Al-Sarakhsi : op. cit., vol. xxix, pp. 165-171.

⁶⁵Al-Jurjani : op. cit., p. 32.

get one-sixth and its division shall be equal between them. Regard shall be had of one or two relationships. [Section 14 (2)].

Syrian Law of Inheritance: One or several *Jaddah Sahihah* shall be entitled to one-sixth. Its division shall be equal between all the *Jaddah*. No regard shall be had of either one or two relationships. (Section 272).

Tunisian law of Inheritance : *Jaddah* whether from father's side or from mother's side, one or more..... shall be entitled to one-sixth. The *Jaddah* who is from father's side, in the existence of the father, shall not be the heir; and any *Jaddah* from father's side or from mother's side, in the existence of the mother, shall not be entitled to inheritance. (Section 111).

Moroccan Law of Inheritance : *Jaddah* is entitled to one-sixth when she is alone whether she is the paternal grandmother or maternal grandmother. If there are more than one, the one-sixth share shall be divided between them when they both are equal in degree of relationship. If the maternal grandmother is closer and the paternal grandmother is the remote the entire one-sixth shall belong to the maternal grandmother. (Section 224).

The viewpoint of Imam Ibn Hazm :

Regarding the fixation of one-sixth share in the estate for the grandmother it is stated that the same has been fixed by the Prophet. But Imam Abu Muhammad Ibn Hazm with reference to Ta'us (a successor) has written that it is not correct. The one-sixth share being incumbent for the paternal grandmother is the disconnected narrative⁶⁵ from Haḍrat Abu Bakr, 'Umar, Ibn Mas'ud, 'Ali and Zaid Bin Thabit.⁶⁶ The fact is that Ibn Hazm does not hold the disconnected narrative as proof; hence according to him the fixation by the Prophet of one-sixth for the paternal grandmother does not stand proved; rather it stands proved from these Companions' narratives. Consequently, according to Ibn Hazm, the "Jaddah" gets one-third in the same circumstance in which the mother of the deceased gets one-third, and where the mother gets one-sixth the jaddah gets one-sixth. This is merely his assumption. As against this, there is the narrative of the Prophet's Companions which fixes merely one-sixth share for the Jaddah. However, according to this writer, the verdict of the Companions attains a much higher degree of acceptance than merely an assumption of Ibn Hazm.

^{65a}About this narrative Ibn Hazm has used the word "*Mursal*", which in the terminology of traditionists also means *Munqata'* (Disconnected).

⁶⁶Ibn Hazm : op. cit., vol. vi, p. 332; Yusuf Musa ; op. cit., p. 230.

Section 301. An 'Asbah Nasabi describes each of those heirs who takes the entire estate, if there is no *Dhu Fard* (Sharer) or takes all the estate that remains as residue after giving the shares to all the *Dhawi al-Furud* (Sharers).

COMMENTARY

The literal meaning of 'Asbah is encircling an object by another object from every side. It also means 'back.' As a man's semen is supposed to be drawn from near the back bone, that relative is technically called 'Asbah who is directly related through a male with the deceased and who, after giving away the defined shares to the *Dhawi al-Furud*, is entitled to the residue of the estate in the law of inheritance. Therefore, if a woman intervenes in the chain of relationship with the relative he does not remain an 'Asbah, for example, the uterine (Akhyāfi) brother. The Akhyāfi sister likewise is a relative through mother not through the father. She as well is not included in 'Asbā; rather she is included in *Dhawi al-Furud*. The daughter's son or the father of the mother is included in *Dhawi al-Arḥām*, because his relationship with the deceased is merely through a woman (daughter, or mother).

Section 302. The 'Asbat Nasabi are of three kinds as Kinds of 'Asbah Nasabi under :—

1. 'Asbah bi Nafsihi : He is an heir who is the 'Asbah in his own right and no woman intervenes between him and the deceased.

2. 'Asbah bi Ghairihi or Bil Ghair : She is that female heir who, on account of another heir, becomes the 'Asbah and that another is the partner in her being 'Asbah.

3. 'Asbah Ma' al-Ghair : She is that female heir who, on account of another heir, becomes the 'Asbah but that another is not her partner in being an 'Asbah.

COMMENTARY

There are three kinds, of 'Asbat Nasabi, as detailed below :—

'Asbah bi Nafsihi (أصله ناسبه):

'Asbah in his own right, is that relative who is male and whose relationship with the deceased is without an intervening female i. e. his

relationship is not through a woman, such as the deceased's son or father because their '*Aṣubat*' stands established directly with the deceased on account of their personal relationship. Relatives of four degrees are included in '*Asbah bi Nafsihi*' of whom some have preference over the others. Serially they are as under :—

1. The persons who themselves are the offsprings of the deceased i. e. son, grandson, great grandson, one after the other, of howsoever low in degree.

2. The persons of whom the deceased himself is the offspring i. e. father, grandfather, great grandfather, one above the other, of howsoever high in degree.

3. The persons who are offsprings of the father of the deceased i. e. the true brother, consanguine ('*Allāti*') brother, true brother's son, consanguine ('*Allāti*') brothers' son, one after the other, of howsoever low in degree.

4. The persons who are the offsprings of the grandfather of the deceased i. e. the true uncle, consanguine ('*Allāti*') uncle, the son of the true uncle, one after the other, of howsoever low in degree.

The above arrangement or order is in accordance with their entitlement according to the point of view of Imam Abū Hanifah. According to Sahibain (Imam Abu Yusuf and Imam Muhammad Al-Shaybani), however, there is a difference in the aforesaid arrangement or order, that is, in case the '*Asbāt*' are of the second category as stated above but instead of the father of the deceased the grand-father is alive, he does not exclude the brothers of the deceased. Rather, in the presence of the brothers and sisters of the deceased (the father not being there) the grand-father gets the share equal to that of a brother of the deceased. In other words, according to Ṣāhibain, the heirs of the second and third degree become the heirs together in the presence of the grand-father (the father not being alive). (For details on the subject see Section 299 *supra*).

The estate that is left over after giving the fixed shares to the *Dhawi al-Furūd*, the above stated four grades of heirs with the above exception shall be the heirs of the deceased respectively. If any of the afore-stated three degrees of heirs is not present, the true uncle of the father, the consanguine ('*allāti*') uncle of the father, the son of the true uncle of the father, the son of the consanguine ('*allāti*') uncle of the father, of howsoever low in degree, shall in that order be the heirs. If they

also are not present, the true uncle of the grandfather and their male issues, of howsoever low in degree, shall in that order be included in the first category of 'Asbat i.e. 'Asbah bi Nafsihi (عصبه بنفسه):

The principle is that the heir who is closest to the deceased shall get priority in getting the estate, as the son over the father or the grand-father. Of the heirs the one, whether male or female, who has two relationships with the deceased, shall get preference over the heirs who have only one relationship with the deceased. Thus, the true brother shall get preference over the consanguine ('allāti) brother, and the true sister, when she becomes the 'Asbah with real daughter and sons's daughter, shall get preference over the consanguine brother. The true uncle shall get preference over the consanguine uncle. The same rule shall be followed in case of the uncle of the father and the uncle of the grand-father.

If after distribution of the estate among the *Dhawi al-Furūd* there is no thing left of the estate, the question of its distribution among the 'Asbat (Residuaries) does not arise. For instance, a woman leaves behind her husband, true sister and a consanguine brother. In such a case, the husband shall get half and the sister shall get the other half. The consanguine brother, an 'Asbah shall get nothing, as nothing is left there for him after distribution among the *Dhawi al-Furūd*.

Asbah Bil-Ghair (عصبه بالغير):

'Asbah Bil Ghair or 'Asbah bi Ghairihi is that relative who, because of the presence of another heir, becomes the 'Asbah. Technically, in the law of inheritance, 'Asbah Bil-Ghair is a female who assumes the capacity of 'Asbah alongwith a male 'Asbah, and that another 'Asbah is her partner. That is to say, the female, because of a male partner with her, becomes the 'Asbah. The females who become the 'Asbāt because of a male partner are four in number: (1) Daughter; (2) Son's daughter; (3) Sister; and (4) consanguine sister. All these four females, in the presence and alongwith their brothers, become the 'Asbāt and are entitled to their shares in the estate with their brothers in accordance with the general rule "to a male double of a female." If there is none to turn them into 'Asbāt, these females get their shares as *Dhawi al-Furūd*. God's words, *يُوصِيكُمُ اللَّهُ فِي* "Allāh (thus) directs you as regards your children's" *أولادكم مثل حظ الانثيين*

⁶⁷Qadri Pasha: *Al-Aḥkām al-Sharī'yyah Fīl Aḥwāl al-Shakhsiyyah*, Cairo, Section 610.

(inheritance) to the male a portion equal to that of two females' (IV:11) prove the said first two (daughter and son's daughter) to be the '*Asbāt* and God's words, 'ان كانوا اخوة رجالا ونساء فللمذكر مثل حظ الانثيين' 'If there are brothers and sisters, (they share) the male having twice the share of the female', prove the said last two (real sister and consanguine sister) to be the '*Asbāt*. Excepting them, no other female can become an '*Asbāh*.

Females in their own right are not '*Asbat*'; rather they become '*Asbāt* alongwith their brothers. When any of the afore-stated females becomes an '*Asbah* she is entitled to get her share after the distribution of the respective shares among *Dhawi al-Furūd*, in the residue of the estate. As an instance, a woman leaves behind her husband, parents, daughter, a son's daughter, and a son's son. The son's daughter, in the presence and alongwith her brother the son's son, shall become '*Asbah bil Ghair* and she shall get her share from the residue, if any, after the *Dhawi al-Furūd* get their shares. But the estate is not enough for giving to the husband one-fourth, the parents one-third, and the daughter one-half towards their shares as *Dhawi al-Furūd*. The son's daughter becoming, in this case, the '*Asbāh bil Ghair* because of the presence of her brother (son's son) shall get nothing. If the son's son had not been there she, alongwith the daughter, would have been, in another capacity, entitled to a share on the basis of "completing the two-thirds for daughter and son's daughter), the division would have been effected through '*Awl*. Consequently she, too, would have been held entitled to the estate and in presence of only one daughter would have taken her share. That is to say, in the first case the husband shall get $\frac{3}{13}$, the mother $\frac{2}{13}$, the father $\frac{2}{13}$ and the daughter $\frac{6}{13}$, whereas in the second case after applying the doctrine of '*Awl* the husband gets $\frac{3}{17}$, the mother $\frac{3}{17}$, the father $\frac{3}{17}$, the daughter $\frac{6}{17}$, and the son's daughter shall get $\frac{2}{17}$. In another instance, a woman leaves behind her husband, a true sister, a consanguine sister and a consanguine brother. In this case, the husband shall get the half and the true sister shall get the other half of the estate. The consanguine brother being there the consanguine sister becomes an '*Asbah bil Ghair* and as no residue remains, she as well as her brother shall get nothing. If there had been no consanguine brother, she alongwith the true sister in the capacity of *Dhu Fard* would have become entitled to a share to make up two-thirds for the sisters and the denominator being increased to 7, the husband would have got $\frac{3}{7}$, the true sister $\frac{3}{7}$ and the consanguine sister would have got $\frac{1}{7}$.

But there are some 'Asbāt who do exclude their sisters altogether. The 'Asbāt who themselves inherit but do not allow their sisters to be their co-shares are three : 1. Uncle, 2. Son of the uncle. 3. Son of the brother.

'Asbah Ma' al-Ghair (عصبه مع الغير) :

'Asbah Ma' al-Ghair is that female relative who becomes the 'Asbah only alongwith other female relative, who is, however, not her partner. Thus, the true or consanguine sister of the deceased becomes an 'Asbah only with the daughter or son's daughter of the deceased, whether they are one or more.⁶⁸ For instance, the deceased leaves one daughter, one sister and one or more than one consanguine brother. In such a case the true sister joined with the daughter becomes an 'Asbah. Thus the daughter shall get half of the estate and the true sister shall get the remaining half of the estate. The consanguine brother shall not be entitled to any share. The basis is the Prophet's saying 'اجعلوا الاخوات مع البنات عصبه', i. e. Make the (real) sisters joined with daughters the 'Asbāt (Residuaries).

The difference between 'Asbah Ma' al-Ghair and the 'Asbah bil Ghair is that in 'Asbah bil Ghair this another (ghair) is himself an 'Asbah bi Nafsihi. That is why, the 'Asūbat passes or extends to the woman (being in the same degree of relationship). In 'Asbah Ma' al-Ghair this another (ghair) is not himself an 'Asbah bi Nafsihi; rather the 'Asubat is created in her by being joined with the other.⁶⁹

Section 303. The general rules of succession of 'Asbāt are General rules of succession of 'Asbat as under :

1. The closer shall have preferential entitlement over the remote.
2. In the case of there being 'Asbāt of equal grade, stronger relationship shall be relied upon.
3. In case of the presence of several kinds of 'Asbāt, at the same time, the closer one to the deceased shall be preferentially entitled to inheritance.
4. Distribution among the 'Asbāt shall be per head.

⁶⁸Al-Sharakhsi : op. cit., vol. xxix, pp. 151-58.

⁶⁹Qadri Pasha : op. cit., Section 614.

COMMENTARY

After giving the fixed shares to *Dhawi al-Furūd*, the estate that is left over shall belong to the '*Asbat*'. The Prophet's saying is that the estate left over, after giving to *Dhawi al-Furūd*, their shares is for the male-relative closer to the deceased.⁷⁰

Closer has preference over the remote :

From among the '*Asbāt*' the one who in relationship is closer to the deceased, shall have, in the matter of inheritance, precedence over all. Thus, in the above-stated four grades, foremost precedence is given to those who are the offsprings of the deceased, i.e. his son, daughter his son's son, and daughter of howsoever low in degree. Thereafter is the grade of the root of the deceased, such as his father who, in the presence of the daughter (and in the absence of the son), is the '*Asbah*' as well as the *Dhu fard*. After the father, according to Imam Abū Hanifah, the true paternal grand-father is the substitute of the father. Thereafter is the offspring of the father, that is, the true brother. Thereafter is the consanguine brother, then is the son of the true brother and then is the son of consanguine brother, of howsoever low in degree.⁷¹

Grading the brothers later than the father's father is in accordance with the rule of conduct of Imam Abu Hanifah, whereas the Ṣāhibain placing the grand-father as co-sharer with the brother give him the share equal to that of a brother. Same is the rule of conduct of Imam Shafi'i. The last grade, in accordance with the arrangement or order of inheritance, on the basis of '*Asubāt*', is of the offspring of the father's father, as the true uncle, then the consanguine uncle, thereafter the son of the true uncle, then the son of the consanguine uncle, of howsoever low in degree, thereafter the uncle of the father, then his son, thereafter the uncle of the father's father, then his son and so on.

As has been stated above, the son respecting his rights in the estate, has preference over the father on the basis of '*Asubāt*'. The reason being that the son is the offspring, the branch (*far'*) and the father is the root (*aṣl*) of the deceased. The relation of the 'branch' with the deceased is

⁷⁰Al-Muslim : op. cit., *Kitāb al-Farā'id* :

”روى عن ابن عباس قال قال النبي صلى الله عليه وسلم الحقوا الفرائض باهلها فما ابقرته فلاولى رجل ذكر“-

⁷¹Al-Haskafi : op. cit., vol. v, p. 546.

stronger than that of the 'root'. The issues of the son have preference over the father, in as much as the basis of their right as well is the same, the son having preference over the father. Likewise 'father' being closer to the deceased than the 'grand-father', has, in principle, the same preference as the 'son' having preference over the 'grandson'.

Thus of the above-stated grades, if any of the '*Asbāt*' of the first grade is present, of howsoever low in degree he may be, no '*Asbah*' of the second grade shall get any inheritance from the deceased. Likewise, if there is any '*Asbah*' of the second grade, of howsoever high in degree he may be, he shall exclude all the '*Asbāt*' of the third grade and so on. Here it should be borne in mind that the said arrangement or order is based on '*Asūbat*'. Of the heirs, who are mentioned in the above gradation, if any one of them is *Dhu Fard* as well, e. g. the father of the deceased, his right as *Dhu Fard* is superior, distinct and separate by itself. However, where a *Dhu Fard* is entitled to get the estate as '*Asbah*', his right is determined in accordance with the gradation stated above. According to *Sāhibain*, the heirs mentioned in the third grade assume with grand-father the status of heirs mentioned in the second grade. (For details, See Section 299 *supra*.)

Preference to stronger in relationship :

Those of '*Asbāt*' who are of equal grade the one who has stronger relationship shall be entitled to the estate; the rest shall be excluded. For instance, the true and the consanguine brothers though are of equal grade but the true brother being related to two sides, he has preference over the consanguine brother. Likewise, the consanguine brother has preferential entitlement over the son of the true brother in as much as the consanguine brother is closer to the deceased compared to the son of the true brother. Similarly, the son of the true brother is of higher rank than that of the son of consanguine brother because he has two relationships, though in grade both are equal. Similarly the true uncle of the deceased has preference over the consanguine uncle.

3. Presence among several kinds of 'Asbat :

If several kinds of '*Asbāt*' are present at the same time, some of whom are '*Asbāt bi Nafsihi*', some are '*Asbat bil Ghair*' and some are '*Asbat Ma'al Ghair*', the preference shall be given to that '*Asbah*' who is closer to the deceased. For instance, a person dies leaving behind him a daughter, a true

sister, and a son of consanguine brother. The daughter shall get half of the estate, the sister shall get the other half and the son of the consanguine brother shall be excluded, because the sister is closer to the deceased than the son of the consanguine brother. Likewise, if there is a son of the brother and the uncle, the son of the brother shall get the entire estate and the uncle shall be excluded⁷² on the basis of the rule "Nearer excludes the remote".

4. Rule of distribution among 'Asbat :

If of 'Asbāt, the group is made up of individuals of the same rank, the members of the group shall get the estate *per capita* and not *per stripe* (per head not per root). For instance, a person dies and leaves behind one son from one brother and ten sons from another brother. The estate shall be divided into eleven equal shares and one share be given to each of the nephews. The principle of representation shall not be followed and the estate shall not be divided into two : one half being given to the son of one brother and the other half equally divided among the ten sons of the other brother.⁷³ This is the rule and practice followed by all the Sunni schools. According to the Shi'ah *fiqh*, the division shall be *per stripe* and, in the instant case, the estate shall be first divided into two equal parts, one half going to the son of one brother and the other half shall be distributed equally among the ten sons of the other brother,⁷⁴ i.e. the same shares as their fathers would have got had they been alive. Strangely enough, under Section 4 of the Muslim Family Laws Ordinance VIII of 1961, as in force in Pakistan the afore-stated principle has been applied to the division of estate for the pre-deceased son, son's son and daughter, and predeceased daughter's son and daughter without any distinction. (For detailed discussion on this subject see Chapter XXXIX *infra*).

Modern Legislation :

The laws of Inheritance of Egypt (Sections 16-20), of Syria (Section 274-80), of Tunisia (Sections 113-21), of Morocco (Sections 245-51) deal with the inheritance of 'Asbāt.

Section 304. After giving the fixed shares to *Dhawi al-Furud* the residue of the estate, in the event of the non-existence of any 'Asbah, will be returned to and

Return to Dhawi
al-Furud

⁷²Fatawa 'Alamgiri : op. cit. vol. iv, p. 405.

⁷³*Ibid.*

⁷⁴Al-Hilli : op. cit., vol. ii, pt. iv, p. 189.

divided among the *Dhawi al-Furud Nasabi* in proportion to their respective shares on the basis of the doctrine of *Radd 'alā Dhawi al-Furud* (Return to Sharers). This doctrine of Return to Sharers shall also apply to the husband or wife, as the case may be, of the deceased provided there is no *Dhawi al-Furud Nasabi*, or *Dhawi al-Arham* in existence or the Public Treasury duly managed.

COMMENTARY

In the doctrine of *Radd 'alā Dhawi al-Furūd*, the word "*Radd*" literally means "Return". In the law of inheritance, it is the converse of the principle of '*Awl*'. Through '*Awl*', the shares of *Dhawi al-Furūd* decrease whereas through the doctrine of *Radd*, their shares increase. The rule is that after giving away the fixed shares to *Dhawi al-Furud*, if there is some property of the deceased left over and there exists no '*Asbah*' who could be held entitled to it, the said residue is again divided among the *Dhawi al-Furūd*, in proportion to their shares except the spouses. This division in the terminology of the law of Inheritance is called the 'Return to Sharers'.

Basis of the Doctrine :

According to the Hanafi Doctors of *fiqh*, in the non-existence of '*Asbah Nasabi*' and in the event of there being some property of the deceased left out as the residue after giving the fixed shares to *Dhawi al-Furūd*, the same shall be divided proportionately among the said *Dhawi al-Furūd* except the spouse. If, however, there is only the husband or the wife as *Dhu Fard* (*Sababi*) he or she, as the case may be, shall get the said residue of the estate and the doctrine of Return shall be made applicable to them, provided there is none of the *Dhawi al-Furūd 'Asbat* or *Dhawi al-Arhām*. According to the Hanafis, the 'doctrine of Return, is applied only to *Dhawi al-Furūd Nasabi* and not to *Dhawi al-Furūd Sababi* (i.e. husband and wife) because they, after taking their fixed Qur'anic shares, are no more regarded as heirs for the purpose of taking other share of property, except when none exists even from amongst the *Dhawi al-Arham*.⁷⁵

This rule of conduct is stated to be of most of the *Sahābah* (Companions of the Prophet), including Hadrat 'Ali. Indeed, according to Haḍrat Zaid Bin Thābit, after giving to the *Dhawi al-Furūd*, their fixed Qur'anic shares the residue of the estate shall not be returned to them (the *Dhawi al-Furud*). It shall, according to him, belong to the Public Treasury, (*Bait*

⁷⁵Al-Jurjani : op. cit., p. 74; Abdullah b. Mahmud b. Mawdud: op. cit., vol. v, p. 99.

al-Mal). ‘Urwah, Imam Zuhri, Imam Mālik and Imam Shafi‘i too, in pursuance of the assertion of Zaid b. Thābit, do not approve of the doctrine of *Radd*. However, to most of the Shafi‘is the rule is that if the Public Treasury is not properly managed, the residue of the estate is to be returned to *Dhawī al-Furūd*, proportionate to their shares. It is stated from Hadrat ‘Abdullah Ibn ‘Abbās that no ‘Return’ shall be made to the husband and the wife and to the grandmother. But, according to Hadrat ‘Uthmān the ‘Return’ shall be made to the husband and the wife as well. According to him its basis is “ان الغنم بالغرم” (with increase there is the decrease). That is, as there is decrease through ‘*Awl*’ in the shares of the husband and the wife in the same manner they are entitled to the increase as well. Same is the assertion of Jābir b. Yazid.

Argument opposing the Doctrine :

Those jurists, who are opposed to the “Doctrine of *Radd*”, advance the argument in support of their contention that God has expressly fixed the share of *Dhawī al-Furūd* in the Qur’an. No one, therefore, has the right to increase their shares and, thus, after giving them their fixed shares they can not be held to be entitled to the residue of the estate, which shall belong to the Public Treasury, as it happens in the case where a man dies without leaving any heir, the entire estate becomes the property of the Public Treasury. As the rule applies to a ‘whole’, they assert, it shall equally apply to a ‘part’. That is, whatever is the dictate for the whole, the same shall be the dictate for the part.

Argument supporting the Doctrine :

Those who favour “the doctrine of *Radd*” argue both from the Qur’anic verse and the Prophet’s tradition. In the Qur’anic verse (VIII : 75) God says, “اولوا الارحام بعضهم اولى ببعض” (“But kindred by blood have prior rights against each other”). It proves the right of taking the inheritance by the kindred by blood. The verses of inheritance (IV : 11, 12) also prove for some specified kindred by blood their fixed shares in the estate of the deceased. Hence, as far as possible, both the verses shall be acted upon, in as much as that, at first, according to the verses of inheritance, their fixed shares are given to them and in the event of there being no other kindred by blood they, on the basis of the other verse, be held entitled to the remainder estate. That is why, no Return is made to the husband or wife because there is no relationship by blood between them.

Besides, those who approve of the doctrine of ‘Return’ also argue from the tradition of the Holy Prophet stated by ‘Umru Ibn Shu’aib. A woman who had been imprecated by her husband (and thus separated by *Li‘ān* gave

birth to a son, whose pedigree got established from the mother. When he (the son) died, he left behind no heir except his mother. The Prophet held the mother to be entitled to the entire estate left by her son.⁷⁶ The directive of the Prophet regarding giving away the entire estate to the mother is a proof of the validity of the doctrine of 'Return', as the mother's share, in the circumstance, is fixed in the Qur'an as one-third, and she would not have got the residue, except by the *Radd*.⁷⁷ Further, it is there in the tradition stated by Wāṭṭulāh b. Asqā' that the Prophet said, "The woman shall inherit the entire estate left behind by her *Laqīṭ*, (the child lying on the way having been picked up and maintained by her and *ʿAīq*, (the slave who must have been set at liberty by the woman) and the son whose pedigree is denied by the father through imprecation (*li'ān*)"⁷⁸.

Imam Sarakhsi has discussed this matter quite elaborately. He writes that Ḥaḍrat 'Alī Bin Abī Ṭalīb has said that after the fixed shares in the estate have been distributed among the *Dhawi al-Furūd*, if there is any residue and no *ʿAsbah* of the deceased exists, leaving out the husband and wife, the residue shall be distributed among the *Dhawi al-Furūd*, according to their respective shares.⁷⁹

Ibn Mas'ud's View :

It is stated from Ḥaḍrat Abdullah b. Mas'ud that, according to him, excepting the six persons, the residue shall be returned to the other *Dhawi al-Furud*. The six persons to whom there shall be no 'Return' of the residue are : 1. Husband, (2) Wife, (3) the daughter of the deceased when with her there is the grand-daughter, (4) the true sister when with her there is the consanguine (*Allālī*) sister (5) the mother when with her there are issues, (6) Grandmother when she is with some sharer. Same is the view of Imam Ahmad Bin Hanbal.⁸⁰

⁷⁶Abu Da'ud : op. cit., vol. i, p. 403 :

”قال جعل رسول الله صلعم ميراث ابن الملائنة لأمه ولورثتها من بعدها“.

⁷⁷Al-Sarkhsi : op. cit., vol. xxix, p. 192.

⁷⁸Abu Da'ud : op. cit., vol. i, p. 403 :

”عن وائلة بن الأسقع عن النبي صلعم قال المرأة تجوز ثلث موارث عتيقها و لقيطها و ولدها الذي لا عنت عليه“.

⁷⁹Al-Sarakhsi : op. cit., vol. xxix, pp. 192-93; Abdullah b. Mahmud b. Mawdud : op. cit., vol. v, p. 99.

⁸⁰*Ibid*.

Zaid b. Thabit's View :

The assertion of Haḍrat Zaid b. Thabit, as reported, is that after *Aṣḥāb al Farā'id* have taken away their fixed shares, the residue of the property, in the absence of *Asbāt*, shall not be divided among them. Rather, the Public Treasury shall be entitled to it. A narrative, in accordance with the same, is also stated from Haḍrat Ibn Abbas, but the accurate assertion of Haḍrat Ibn 'Abbās is that, excepting the husband and wife and the grandmother, the doctrine of Return shall be applied to other *Aṣḥāb al-Farā'id*.

Hanafis' basis of the Doctrine of "Radd" :

As is evident from the above discussion, the Hanafis base this doctrine on the verse VIII : 75 and the traditions of the Holy Prophet, as referred to above. Hence those who have no womb relationship with the deceased no 'Return' of the residue is made to them. Consequently, no 'Return' is made to the husband and wife as they have no womb relationship. According to them, the right to inheritance is created basically through womb, *rahm*. The *Dhawi al-Arham* shall, therefore, have precedence over the Public Treasury. Likewise the *Dhawi al-Furud* (excepting the husband and the wife), because of womb, shall have precedence over the Public Treasury in the residue of the estate, if there is no *Asbah*.

Maliki View :

The doctrine of "Radd" according to Maliki school of *fiqh* is not valid. In the event of there being no *Asbah*, the residue of the estate shall be the property of the Public Treasury, whether the Public Treasury is managed or unmanaged. *Dhawi al-Arham* shall have no share. However, according to viewpoint of the post-classic Māliki jurists, in the event of Public Treasury not being managed, it shall be valid to make the Return of the residue to *Dhawi al-Furud*.⁸²

Hanbali Rule of Conduct :

According to the authentic version, the Hanbali rule of conduct is in accord with the Hanafi rule.⁸³

⁸¹*Ibid.*

⁸²Al-Abi : op. cit., vol. ii, p. 332; *Ibn Rushd* : op. cit., vol. ii, p. 352, *Sharḥ al-Kabīr*, Cairo, 1911 A.D., vol. iv, p. 481.

⁸³Al-Firozabadi : op. cit., vol. ii, p. 32.

Shafi'i View :

According to Imam Shafi'i as the estate, in the event of there being no *Dhawi al-Furud* and 'Asbat is held to be the property of Public Treasury, likewise, in the event of non-existence of 'Asbah and after giving away the fixed shares to *Dhawi Al-Furud*, the residue of the estate shall be held to be the property of the Public Treasury, provided it is managed properly under the control of a Ruler. If it is not so, according to Shafi'i group of *Ahl-i-Tanzil*, as the author of *Al-Muhazzab* puts it, the residue shall be distributed following the doctrine of 'Return', with the exception of husband and wife, among the *Dhawi al-Furd Nasabi*, proportionate to their shares. If *Dhawi al-Furud Nasabi* do not exist at all and there is no 'Asbah too, the same shall be divided among *Dhawi al-Arham* in the absence of a properly managed Public Treasury. But the authentic rule of the Shafi'i *fiqh* is that the 'Return' cannot be made to *Dhawi al-Furūd*. The Public Treasury shall have the right over the residue of the estate (which shall be spent on the general welfare of the Muslims). Even if the Public Treasury is not managed, no 'Return' shall be made to *Dhawi al-Furud*. Whoever be in possession of the property so left, he shall himself spend it on the affairs conducive to public good.⁸⁴

Conclusion :

Those who do not approve of the doctrine of *Radd*, including Imam Malik and Imam Shafi'i, their basic argument is that God has fixed in the Qur'an the shares of *Dhawi al-Furud*. As their shares are fixed, any increment thereon shall be forbidden as it amounts to going beyond the prescribed limit, for which there is a severe denouncement for those who exceed the limits as has been said by God Himself at the end of the verse (IV : 14), relating to inheritance.⁸⁵ But, according to this writer, it shall be wrong to say that giving to *Dhawi al-Furūd* the residue of the estate through 'Return' amounts to exceeding the prescribed limit, because the manner in which the fixed shares are decreased through 'Awl which stands proved from *Ijmā'*, in the same manner the fixed shares may also be increased. Besides, the verses of inheritance (IV : 11, 12) fixing the shares of *Dhawi al-Furud*, undoubtedly establish the right to a fixed share in the estate for each of them, yet in the event of there being no 'Asbah, the dictates of the Qur'an are implemented

⁸⁴Ibn Qudamah al-Maqdisi : op. cit., vol. vii, p. 201; Abdullah b. Ahmad al-Maqdisi : *Al-Muqni'*, Matba' al-Salfiyyah, vol. ii, p. 424.

⁸⁵Al-Shafi'i : *Kitāb al-Umm*, Cairo, 1961 A.H., vol. iv, p. 76.

in the manner that the sharers, at first, take their fixed shares under verses (IV : 11, 12) and then whatever is left is divided between the *Dhawi al-Furud* on the basis of womb relationship, under the verse (VIII : 75). The verse (IV : 14) may, however, mean that the heirs in whose favour the shares have been fixed in the Qur'an should not be deprived of their shares. Hence, after giving the shares to '*Aṣḥāb al-Farā'id*', when there is no '*Asbah*', to give the residue is not against the intent of the Qur'an, nor can it be said to be going beyond the limits, prescribed by Allah because the '*Aṣḥāb al-Farā'id*', in the non-existence of '*Asbah*', being closer in womb relationship with the deceased compared to *Dhawi al-arhām* are entitled better than the "*Bait al-māl*". Thus, the Qur'anic verse, "اولو الارحام بعضهم اولى ببعض" and the principle of inheritance "الأقرب فالأقرب" both are acted upon. Imam Sarakhsi⁸⁶ has also said the same thing which appeals to reason as well.

So far as the question of non-application of the doctrine of *Radd* to husband and wife is concerned, according to early Hanafis, the husband and wife are entitled only to their fixed shares, whether the Public Treasury is managed or not. But the verdict of later Hanafi '*Ulamā*' is that if the Public Treasury is not properly managed and there is no other heir including *Dhawi al-Arhām*, the residue of the estate shall be made over to the husband or the wife, whoever is alive. Allama Ibn 'Abidin, the author of "*Radd al-Muhtār*" quoting from Imām Ghizali's work, "*Al-Mustaṣfā*" has also stated the verdict, in such a situation, in favour of husband and wife as valid. Besides, he has also quoted from Ahmad Bin Yahya b. Sa'd Taftāzāni that most of the later *Mashā'ikh* have given their verdicts in support of applying the doctrine of *Radd* in favour of husband and wife when no other heir of the deceased exists, because the Rulers (of the time are) *fāsiq* and the authorities have become cruel. (same is the meaning of the Public Treasury being unmanaged). The later Shafi'is have also adopted the same.⁸⁷ According to the later verdict, therefore, it shall be proper to say that in the countries, particularly of non-Muslims, where the Public Treasury is not managed (according to Shari'at) the surviving husband or wife may be given the residue by *Radd*, provided there are no *Dhawi al-Furud Nasabi*, '*Aṣbāt*' and the *Dhawi al-Arhām*.

⁸⁶Ibn Abidin : op. cit., Cairo, 1294 A.H.. vol. v, p. 556.

⁸⁷Al-Amli, Jawwād b. Muhammad b. Husain : *Miftaḥ al-Kiramah*, Cairo, 1326 A.H., vol. viii, p. 113; Yusuf Musa : op. cit., p. 319.

Shi'ah Rule of Conduct :

Shi'ah Zaidiyyah and Imamiyyah are, in principle, convinced of the validity of the doctrine of 'Return' but for wife they do not favour the proposition at all. They, however, allow the residue by the 'Return' in favour of the husband only when no other *Dhu-Fard* exists. Hence the husband, according to the Shi'ah Imamiyah, when he is the only heir, after having been given the half of his fixed share, shall also be given the residue half, on the basis of 'Return'. However, the husband, too, in the existence of any other heir, shall not get the residue under the doctrine of 'Return'. If the deceased has left his widow only as his heir, the unanimous view of the Shi'ahs is that she shall get only her one-fourth share and the residue shall belong either to the Imam or to the Government. It shall never go to the widow by 'Return'.⁸⁸

Al-Hilli, the author of *Sharā'i' al-Islam* has written that there are three assertions regarding the 'Return' in favour of the widow. One is to the effect that 'Return' shall be made. The other is to the effect that 'Return' shall not be made. The third is to the effect that in case of no *Imām*, the 'Return' shall be made to her. According to 'Allamah al-Hilli the correct assertion is that there should be no 'Return' in favour of the widow.⁸⁹

Justice Amir Ali in his book "*Mohammadan Law*" (vol. ii, p. 123) has written that these days there is no substitute for "*Imam*" who can take the residue of the estate. Hence the rule as laid down in *Sharā'i' al-Islam* can not be followed. The modern jurists are in favour of giving the residue of the estate to the widow through 'Return' as well. Same is the situation under the current Iranian Law as well, whereunder if there is only the widow and there is no *Dhu Fard* or *Aṣbah* heir, the widow shall be entitled to the entire legacy.⁸⁹

Zahiri's Rule of Conduct :

Imam Ibn Hazm al-Zahiri has written in his book *Al-Muḥalla* (Vol. vi, p. 380) that after giving the fixed shares to *Dhawi al-Furūd*, if there is the residue and no *Asbah* entitled to it is there, the same shall be spent on the general good of the Muslims, and no part of it shall be given by way of 'Return' to *Dhawi al-Furūd* or to *Dhawi al-arḥām* in as much as, according

⁸⁸Abu Zahra : *Qānūn al-Irānī Rāji' al-Mīrāth 'ind al-Ja'fariyyah*, Cairo, 1959, Section 950, pp. 80-81.

⁸⁹Al-Sarakhsi : op. cit., vol. xxix, pp. 193-94.

to him, the 'Return' is not incumbent under the Qur'ān, Sunnah or the Ijmā'. The argument of Ibn Hazm in this respect is almost the same as that of Imam Shafi'i.

Modern Legislation :

In Egypt under section 30 of the *Qanun-al-Mawarith* No. 77 of 1943 it has been laid down that after having been given the fixed shares to *Dhawi al-Furud* in the estate, if there is the residue and there is no '*Asbah Nasabi*' leaving aside the husband and wife, the residue shall be distributed among *Dhawi al-Furud*, in proportion to their fixed shares. If no one of '*Asbah Nasabi*' or *Dhu Fard Nasabi* or *Dhawi al-arhām* exists, the 'Return' shall be made to one of the spouses, 'husband or wife', whoever is alive. The Syrian law of inheritance too on this subject is in accord with the Egyptian law. (Section 288). In Tunisian and Moroccan Laws, there is no provision of *Radd* available, apparently because the doctrine of *Radd* under the Maliki *Fiqh* is not recognized and the Māliki *fiqh* is in practice in Tunisia and Morocco.

Indo-Pakistan Courts' Decisions :

Indo-Pakistan courts, on the question of *Radd*, have pronounced their decisions in accordance with the Hanafi rule of conduct. Indeed, when there is no heir except the husband or wife, the wife or the husband (whoever exists) has been held entitled to the residue through the doctrine of *Radd* (as no *Bait al-Māl*, existed then). It has thus been held in the case of *Guja Dhar Pershad vs. Sahikh Abdullah* (WR 220) that when *Dhawi al-Furūd* exist but no '*Asbah*' is there, the residue of the estate shall be given, excepting the husband and wife, to *Dhawi al-Furūd*, in accordance with their shares. It was also held that even presence of the *Dhawi al-Arḥām*, shall not prevent the application of the doctrine of *Radd* in favour of *Dhawi al-Furud*. In the case of "*Mohammad Arshad Chaudhry vs. Sajida Bano* (3-C, 702) it has been held that in the non-existence of *Dhawi al-Furūd* and *Dhawi al-Arham*, the residue shall be given to the widow. In the case of "*Konari Bibi vs. William Bibi*" (11-C, 14) it has been held that a widow, in fact, is not entitled to any share through the doctrine of *Radd*, but in her favour an exception has been made against the Public Treasury that if *Dhawi al-Arḥām* as well are not in existence the residue shall be given to her. It has been held in another case "*Bafatan Vs. Qayam*" (30-C, 683) that in the event of the *Nasabi Dhawi al-Furūd* and *Dhawi al-Arḥām* not being there, the estate shall belong to the wife or husband, as the case may be, through *Radd*.

Section 305. The relatives of the deceased who are neither the
 Definition of *Dhawi al-Furud* nor 'Asbāt are called *Dhawi*
Dhawi al-Arham al-Arhām.

COMMENTARY

The literal meaning of *Dhawi al-Arhām* is "relatives by womb". But in the terminology of the law of inheritance, that relative is included in the definition of "*Dhu-Rahm*", who is neither the *Ṣāhib al-Farḍ* (whose share is fixed under the Qur'ān, Prophet's Sunnah or the Ijmā' of the Ummah) nor is the 'Asbah.⁹⁰

Section 306. In the absence of the *Dhawi al-Furūd* and the
 Inheritance by 'Asbāt, the *Dhawi al-Arhām* are entitled to the
Dhawi-al-Arham estate.

COMMENTARY

According to the Hanafi rule of conduct, in the absence of *Dhawi al-Furūd* and 'Asbāt, *Dhawi al-Arhām* are entitled to inherit the estate.⁹¹ According to them, the relatives of the deceased have been divided into three grades. The foremost grade is of *Dhawi al-Furūd* whose shares are fixed. Thereafter is the grade of 'Asbāt who are entitled to the residue of the estate left over by *Dhawi al-Furūd* having got their fixed shares. If there is no *Dhu-Fard*, 'Asbāt are entitled to the entire estate. After the *Dhawi al-Furūd* and 'Asbāt, the third grade is of *Dhawi al-Arhām*. *Dhawi al-Arhām* are those relatives who are neither the *Dhawi al-Furūd* nor the 'Asbāt.

Indo-Pakistan Courts' View :

Same is the point of view of the Indian and Pakistani Courts. It has, therefore, been held in the case of "*Umar Din vs. "Mohammad Bakhsh"* (77 PLR 1904; 27 PR 1904) that *Dhawi al-Arhām* include all, whether close or distant blood relatives who are neither the *Dhawi al-Furūd* nor 'Asbāt.

According to the Hanafis, if *Dhawi-al-Furūd* are not there nor are the 'Asbāt, the *Dhawi al-Arhām* shall be entitled to the estate. If, however, the husband and wife are there, after giving them their fixed shares, the residue of the estate shall be divided among the *Dhawi al-Arhām*. According to the Shafi'is, in such situation, the Public Treasury has precedence over the

⁹⁰ Al-Jurjani : op. cit., p. 95.

⁹¹ Ibid, pp. 74-75.

Dhawi al-Arhām, provided it is well managed. However, if the Public Treasury is not well managed and there is no *Dhawi al-Furūd* or *‘Asbāt*, the *Dhawi al-Arhām* shall, then, be entitled to it. Same is the rule of conduct of the Mālikis but the Public Treasury, according to Hanbalis, has no right to it.⁹²

Basis of Hanafis' Rule :

According to the Hanafis the basis of the entitlement of *Dhawi al-Arhām*, after the *Dhawi al-Furūd* and *‘Asbāt*, is that anyhow they all are related to the deceased. (VIII : 75). Hence the claim of Public Treasury should be the last. This point of view, according to this writer as well, appears to be sound.

A majority of the Companions of the Prophet including Ḥaḍrāt ‘Umar, ‘Ali, Ibn Mas‘ud, Abu ‘Ubaidah, Ibn al-Juraij, Mu‘adh Bin Jabal, Abu al-Darda, Ibn ‘Abbās, and others (God be pleased with them all) are convinced of the inheritance of the *Dhawi al-Arhām*. From amongst the successors, ‘Alqamah, Ibrahim Nakḥ‘i, Shuraih, Hasan Bin Ziyād, Ibn Sirān, ‘Aṭā and Mujahid are also convinced of the same. Imam Abū Hanifah, his two illustrious disciples, Imam Zufar and other Hanafī Imams as well have adopted the rule of conduct of the said Sihābah and Ṭābi‘ūn (the Companions of the Holy Prophet and their Successors).⁹³

Hanbali Rule :

Hanbali school of *fiqh* is also convinced of the right of inheritance of *Dhawi al-Arhām*.⁹⁴

Malikis and Shafi'is Practice :

Imam Malik and Imam Shāfi‘i are not convinced of the right of inheritance of *Dhawi al-Arhām*. They follow the verdict of Zaid b. Ṭhābit and according to a rare narrative that of Ibn ‘Abbās, who are not convinced of *Dhawi al-Arham's* inheritance. According to them the estate, in the event of *Aṣbah al-Farā'id* and *‘Asbat* not being there, shall belong to the Public Treasury. Among the Ṭābi‘ūn, Hasan al-Basri, Sa‘id b. al-Musayyib, Sa‘id b. Jubair and Sufyan Ṭhawri are also not convinced of the *Dhawi al-Arham's* inheritance.⁹⁵

⁹²Al-Maqdisi : *Al-Mughni*, vol. vii, p. 47.

⁹³Al-Jurjani : op. cit., p. 96.

⁹⁴Al-Maqdisi : *Al-Mughni*, vol. vii, pp. 82-83.

⁹⁵Al-Jurjani : op. cit., p. 98.

Shi'ah Imamiyah :

The Shi'ah Imamiyah, like the Hanafis, are also convinced of the inheritance of *Dhawi al-Arham*.⁹⁶

Zahiriyyah :

Zāhiriyyah are not convinced of *Dhawi-al-Arham's* inheritance. According to them, in case of there being no *Dhawi al-Furūd*, '*Asbāt, Muqir Lahu bil Nasab*, the estate shall be given to the Public Treasury.⁹⁷

Argument in opposition to *Dhawi al-Arham's* Inheritance :

The jurists who are not convinced of *Dhawi al-Arham's* inheritance put forward two contentions :

1. That Got had mentioned the shares of *Dhawi al-Furūd* and '*Asbāt* in the verses relating to inheritance. There is no mention of *Dhawi al-Arham's* inheritance in them. Had there been any share of *Dhawi al-Arham* God must have mentioned it.
2. That the Prophet was asked of the inheritance of the father's sister and of the mother's sisters. Prophet said that he has been informed by Gabriel that there were no shares for any of them.⁹⁸

Argument in support of *Dhawi al-Arham's* Inheritance :

Those who are convinced of the Inheritance of *Dhawi al-Arham*, in support of their view, rely on the verse of the Qur'an, (VIII : 75), which implies that in the matter of inheritance some relatives have preference over the others. On the basis of this verse, they argue that prior to the revelation of this verse the basis of inheritance was "Fraternity" "مواخاة" which was abrogated by this verse. Thus, the right of inheritance then passed to *Dhawi al-Arham*. Literally, the term *Dhawi al-Arham* includes all relatives whether they are *Dhawi al-Furud* or *Asbat*. God has fixed the shares for some of them as *Dhawi al-Furud* and some of them have been held entitled to estate as '*Asbah*. Hence, through this verse, the shares of other *Dhawi al-Arham*, besides these two kinds of the heirs get established. Thus, it can not be said that it is an addition on the 'Book of God'.

⁹⁶Al-Hilli : op. cit., vol. ii, pt. iv, pp. 119-90.

⁹⁷Ibn Hazm : op. cit., vol. vi, p. 380.

⁹⁸Al-Jurjani : op. cit., p. 96.

Besides, the Hanafis also rely on several traditions as under:—

1. Suhail b. Hanif was shot dead by an arrow. He had no heir except his maternal uncle. Abu 'Ubaidah b. Jarrāḥ asked Haḍrat 'Umar whether the maternal uncle could be the heir. He replied that the Prophet has said, "God and Prophet are the heirs of those who have no heirs, and the maternal uncle is the heir of one who has no heir."⁹⁹
2. On the death of Thabit b. Daḥḍāḥ the Prophet asked Qais b. 'Āṣim, "Does any one of you know that this deceased has any relative." He replied, "The deceased was an stranger amongst us, we do not know any of his heirs, but that he has a son of his sister, whose name probably is Abu Lubāb Ibn Abdullah b. Munzir." The Prophet gave away the estate left by the deceased to Abu Lubab.¹⁰⁰

Section 307. The order of the inheritance of *Dhawi al-Arham*

Order of Inheritance by Dhawi al-Arham is as under:—

1. Those who are related to the deceased such as the issues of the daughters and daughter's daughters of the deceased and so on.
2. Those to whom the deceased is related, such as mother's father, the father of the mother's father, the mother of the mother's father, or the mother of the mother's of the grand father of the deceased and so on.
3. Those who are related to the mother and father of the deceased, such as the issue of the sister, daughter of the brother, issues of uterine (*akhyāfi*) brothers and sisters of the deceased and so on.

⁹⁹Al-Tirmidhi : op. cit., p. 306 :

”عن ابى امامة بن ابى سهل بن حنيف قال كتب معى عمر بن الخطاب الى ابى عبيدة ان رسول الله صلى الله عليه وسلم قال : الله ورسوله مولى من لا مولى له والخال وارث من لا وارث له“.

¹⁰⁰Al-Sarakhsi : op. cit., vol. xxx, p. 3; Al-Maqdisi : op. cit., vol. vii, p. 85.

4. Those who are related to two grandfathers or to two grandmothers of the deceased as true (*aiyni*), consanguine (*allāti*) or uterine (*akhyafi*) father's sisters, mother's brother and mother's sisters of the deceased and so on.

COMMENTARY

For the inheritance of the *Dhawi al-Arḥām* the following are to be observed:—

1. If there is only one person of *Dhawi al-Arḥām*, he shall get (like '*Asbah*') the entire estate.
2. If none of the *Dhawi al-Furud* and '*Asbat*' is there, the *Dhawi al-Arham* shall be the heirs. In case only the husband or wife among the *Dhawi al-Furud* is there, the *Dhawi al-Arham* shall be the heirs with them; e.g. if only the husband and the mother's father are there, after giving the fixed share to the husband, the residue shall be given to the mother's father.
3. So long as any of the first grade among of the *Dhawi al-Arham* is there, of howsoever low in degree, no *Dhu-Rahm* of the second grade shall inherit the estate. Likewise, there shall be observed the same order of priority in rest of the grades.
4. The closer one in degree shall exclude the remote though the closer one may be a female.
5. When *Dhawi al-Arham* belong to the same degree the stronger in relationship, whether male or female, shall get the estate. The rest shall be excluded.
6. If the '*Uṣūl*' (ancestors) are the same the division of the estate among the *Dhawi al-Arham* shall take place on the basis of *Abdān* per head. If the '*Uṣūl*' (ancestors) are not the same the estate shall be distributed among them on the basis of *Asl*, *per stripe*.¹⁰¹

Modern Legislation :

In Egyptian "*Qanun al-Muwarīth*" of 1943 the *Dhawi al-Arḥām*, in the non-existence of *Dhawi al-Furud* *Nasabi* and '*Asbat Nasabi*', have been held entitled to inheritance (Sections 31-38). In Syria as well similar law has

¹⁰¹Al-Jurjani : op. cit., pp. 97-98.

been enacted (Section 289-97). In Iraq's "*Qanūn al-Mirath*, the *Dhawi al-Arham* have not been included in the list of the persons entitled to inheritance and same is the case with Tunisian law.

Pakistan :

Indo-Pakistan courts have been, in accordance with the Hanafi and Shi'ah rules of conduct, giving decisions in favour of the inheritance of *Dhawi al-Arham*, when no *Dhu-Fard* or '*Asbah* is present.

Section 308. In the event of non-existence of the *Dhawi al-Mawla al-Muwalat* *Furud*, *Nasabi* or *Sababi*, *Asbat* or *Dhawi al-Arham*, the *Mawla al-Muwalat* is held entitled to the estate with whom the deceased of 'unknown parentage' has entered into a valid agreement of *Muwalat* for inheriting him (the deceased of unknown parentage).

COMMENTARY

Mawla al-Muwalat is the person with whom a person of 'unknown parentage', whether male or female, enters into an agreement that he is that other person's *Mawali*. If he dies in that person's lifetime that person shall be entitled to the estate left by him. If an offence is committed by him which makes him liable to pay compensation that person shall, on his behalf, pay the compensation. That other person is called the "*Mawala al-Muwalāt*" of the person of 'unknown parentage'. If both the persons are of 'unknown parentage' and enter into such an agreement between themselves, they shall be *Mawala al-Muwalat* of each other and the agreement shall be called the "*Contract of Mawalat*" Indeed, in case of there being the husband or wife of the person of the unknown parentage, after giving the fixed share to the surviving spouse, the *Muwala al-Muwalāt* shall get the residue.¹⁰² This has been the position according to the Hanafis. According to Shafi'is, *Mawala al-Muwalat* gets no inheritance.¹⁰³ According to other schools of Sunni *fiqh* also no inheritance is proved for *Muwala al-Muwalāt*.

Basis of the Rule :

The Hanafi jurists, in connection with the inheritance of *Muwala al-Muwalat*, rely on the tradition of the holy Prophet that *Tamim Dari* (God

¹⁰²*Ibid*, p. 9.

¹⁰³*Al-Shafi'i : Kitāb al-'Umm*, vol. iv, p. 78.

be pleased with him) asked the Prophet, "If one accepts the faith on my hand and enters into "*Muwalat*" with me what shall he then be? The Prophet replied, "He shall be your brother and you shall have a better rights in his life and death".¹⁰⁴

Shi'ah Practice :

According to the Shi'ahs the "*Mawla al-Muwalat*" has been interpreted with the words of "*Mawala Daman bil Jarirah*", which conveys almost the same meaning. The rule of *Mawla al-Muwalat* is thus recognized by them.¹⁰⁵

Post-Classic View :

In the modern age, there is little room for the inheritance of *Mawla al-Muwalat*. However, according to the latest verdict (*fatwa*) of the jurists, since the doctrine of 'Return' (*Radd*) has been made applicable to spouses, the *Mawla al-Muwalat*, in the existence of the husband or the wife, shall get no inheritance at all.

Section 309. An acknowledged kinsman of unknown descent in whose favour the deceased has made an acknowledgement of kinship, not through himself but through another, is entitled, in the absence of *Dhawi al-Furud*, *Asbat*, *Dhawi al-Arham*, *Mawla al-Mawalat*, to inherit the estate of the acknowledged deceased.

COMMENTARY

"*Muqir lahu bil Nasab 'Alal-Ghair*" is a person in whose favour the deceased has made an acknowledgement of his kinship in the manner that the kinship of the acknowledged one, at first, is related to another person and thereafter is related to the acknowledger, and the acknowledger has remained firm on his acknowledgement till the last moment of his life. For instance, he acknowledges someone to be his brother or sister. This acknowledgement, however, does not prove the lineage of the acknowledged one

¹⁰⁴Al-Sarakhsi : op. cit., vol. xxx, p. 44 :

"وفى حديث تميم الدارى انه سال رسول الله صلعم فقال ان الرجل ليأثبني فيسام على بدى ويواليني فقال عليه السلام هواخوك فانت احق به بمياه وسماته".

¹⁰⁵Al-Tusi, Abu Ja'far Muhammad b. al-Hasan : *Al-Istibsār*, Najaf, 1957, vol. iv, pt. iii, p. 199.

with that of the other relatives of the acknowledged. The acknowledged one shall merely be entitled to inherit the estate of the acknowledged alone.

The person in whose favour the lineage is acknowledged are of two kinds:—

1. The acknowledged makes an affirmation that another person is his son or daughter. In this case the lineage of the acknowledged one shall get established with the acknowledged directly; thereafter it shall get established with the father of the acknowledged. Thus the acknowledged shall at first be held to be the father, and thereafter the father of the acknowledged shall be held to be the grandfather. In this kind of acknowledgement the person acknowledged becomes the direct heir of the acknowledged and so of others, and he inherits like any other heir of the deceased.
2. The acknowledged acknowledges the kinship in a manner that the kinship of the acknowledged one at first gets established with another person; thereafter through that another person it gets established with the acknowledged. For instance, a person is acknowledged to be the brother or sister or uncle of the acknowledged. In this case the kinship shall at first be established with the father or grandfather. Through them it shall get established with the acknowledged and he shall be held to be the brother or sister or uncle of the acknowledged. In this kind of acknowledgement, the person acknowledged one gets the estate of the acknowledged deceased alone, (and of no other relative of the deceased), provided there is no other heir of the deceased or the *Mawla al-Mawalat*.

Conditions for Acknowledgement :

1. The acknowledgement of the kinship made by the deceased should be in respect of a person of unknown descent as admissible in *Shari'ah*. For instance, if the deceased acknowledged a person to be his brother who, looking to his age, can not be the son of his father, such an acknowledged person shall not be treated as an acknowledged kinsman and get no share in the estate of the acknowledged deceased.

2. The acknowledged kinship by the deceased relates to another person merely by his own acknowledgement. There should be no acknowledgement or evidence by or on behalf of that another person for the kinship.

3. The acknowledger, not having revoked his acknowledgement, should abide by his acknowledgement till his death.

It is an essential condition for acknowledgement that the person acknowledged should be of unknown descent. As adoption is unlawful in Islam, acknowledging the one of known parentage shall not, at all, be valid.¹⁰⁶ According to the Hanafis, the acknowledged kinsman through another, as stated hereinabove, shall get the inheritance if there is no heir.¹⁰⁷ Its basis being acknowledgement through another, its effect is restricted to the acknowledged alone.

According to Maliki, Shafi'i and Hanbali *fiqh*, the "acknowledged kinsman through another" can in no event be the heir.¹⁰⁸ Same is the case with Zahiris.¹⁰⁹

It may, however, be clarified that no right of the 'acknowledged one through another' is created in the estate as an heir. But in case of acknowledgement of kinship by the deceased direct through himself (not through another) shall confer on him the right of heirship. In the former case the acknowledgement of kinship through another is limited to the acknower alone and its operation has been held to be limited to his own property. Indeed, acknowledging the kinship direct through his own self, i.e. acknowledging the acknowledged one to be his son or daughter shall obviously make the person so acknowledged to be his heir like any other heir of the deceased.

Modern Legislation :

Under the Egyptian Law of Inheritance the acknowledged kinsman through another, without possessing the qualification of heirship, has been held entitled to estate (Section 41). Same is the law in Syria (Section 298). Tunisia and Morocco do not recognize the acknowledged kinship (through another), obviously because of the Māliki *fiqh* being prevalent there which does not recognize such an entitlement.

Section 310. In the event of there being no heir of the legator, or any other person as aforesaid, the Will made by him in favour of a legatee regarding his entire property shall be valid and enforceable.

Will made regarding the entire property in favour of legatee

¹⁰⁶Al-Jurjani : op. cit., p. 10; *Radd al-Muhtar*, Cairo, 1294 A.H., vol. v, p. 540; Abu Zahra : op. cit., p. 98; Subḥi al-Mahmaṣāni : *Al-Tabanna fil Shari'ah al-Islami*, Lebanon, p. 6.

¹⁰⁷Al-Sarakhsi : op. cit. vol. xxx, p. 71; Al-Kasām : op. cit. vol. viii, p. 230.

¹⁰⁸Al-Shi'ram : op. cit., p. 105.

¹⁰⁹Ibn Hazm : op. cit., vol. vi, pt. ix, p. 380.

COMMENTARY

The legatee regarding entire property "موصى له بجميع المال" is a person in whose favour the deceased has made a 'Will' regarding his entire estate. The rule, according to the Hanafis, is that if none of the *Dhawi al-Furūd*, 'Asbat, *Dhawi al-Arham* or *Mawalat al-Mawlat* or *Muqir Lahu bil Nasab* 'Alal Ghair is persent, the person in whose favour the deceased legator has made a 'Will' respecting his entire property (موصى له بجميع المال) shall be entitled to it. The limitation of one-third of the property placed on a 'Will' is due to the possibility of existence of the heirs. When there is no heir of the deceased in existence, the question of depriving one's heirs does not arise. As there is no question of deprivation of the heir's right, the entire estate shall be given to the legatee.¹¹⁰ This is according to the Hanafi school of law.

Other Schools of Law :

According to the Shafi'is, the legatee shall not, in any case, be given more than one-third of the estate. In the event of there being no heir, the residue of the estate shall be made over to the Public Treasury.¹¹¹ Same is the rule of conduct of the Maliki and Hanbali schools of law.¹¹²

Modern Legislation :

Under the Egyptian Law of Inheritance of 1943, in the event of there being none of the *Dhawi al-Furud*, 'Asbat, *Dhawi al-Arham* (distant kindred) or *Muqir Lahu Bil Nasab* 'Alal Ghair, the legatee shall be given the entire property in the estate, if there is such a will made by the deceased. Since the legacy is not given to 'the legatee of the entire property' as an heir, there shall be no condition for the legatee of belonging to the same religion as that of the legator; rather the general rules regarding 'Will' shall apply. (Also see "law of Wills" pp. 174-401 *supra*).

Section 311. When there is no one in the foregoing Section entitled to the estate of the deceased, the estate
 Right of (Bait al-Mal)
 (Public Treasury) shall belong to the Public Treasury (*Bait al-Māl*).

¹¹⁰Al-Jurjani : op. cit., p. 1.

¹¹¹Al-Firozabadi : op. cit., vol. i, p. 497, *Kitāb al-Wasayah* :

"وما اذا زاد اوصى بما زاد على الثلث فان لم يكن له وارث بطلت الوصية فيما زاد على الثلث لان ماله ميراث للمسلمين ولا ميجيز له--"

¹¹²Al-Abi : op. cit., vol. ii, p. 318.

COMMENTARY

During the period of the four Caliphs and thereafter during the period of several other Caliphs, four heads of the receipts of the income and expenditure of the Islamic State were fixed and maintained separately with the *Bait al-Māl*. If there was no amount, under anyone of the heads of the Public Treasury, it could be transferred from the other head as loan and later re-imbursed. From some heads, however, it could as well be taken without re-imburement, unless the deficient head received surplus income and it was advisable to do so.

The fixed four heads of Public Treasury (*Bait al-Māl*) were as under:—

1. Zakāt and Sadaqāt, offering of all kinds, 'Ushr and the income from the local cess and Muslim traders.
2. Fifth part of the spoils of war, wealth obtained from mines and the treasure troves.
3. Tributes, poll tax, treaty incomes, fines imposed on non-believers and taxes on non-Muslim traders, whether they be the citizens of the country or they may have come with permission to the Islamic State for the purpose of carrying on trade.
4. Unclaimed properties (*res nullius*) and the estate left by the heirless deceased.

The utilizations of the collections under the first head were on items as under:—

1. Maintenance of destitutes, paupers and those who were appointed by the Government to collect the *Zakat* and 'Ushr.
2. Ransoming the slaves (which at present is extinct).
3. Payment of debts of a debtor when he was himself unable to pay (under certain conditions).
4. Pilgrim who may have lost his property during the course of *Haj* journey. (This is only Imam Muhammad's ruling. According to Imam Abu Yusuf the person engaged in *Jihad* as well is included in it when he is unable to meet his and his family's expenses. Abu Yousuf's ruling is generally accepted).
5. Travellers who have lost their property during the course of their journey, thereby unable to continue their journey further.

Providing for a *Dhimmi* (non-Muslim citizen of an Islamic State) from this head of income is not valid. Likewise, providing a non-Muslim of an infidel country from this account is not valid. They may, however, be provided, according to their needs, from propitiatory offerings (*sadaqāt*).

The utilizations of collections under the second head were the maintenance of orphans, paupers (widows and others) and the travellers, as stated above.

The utilizations from the income under the third head were on items as under:—

1. The Armed forces.
2. Demarcation of State boundaries.
3. Fortifications.
4. Setting up soldier's or civil guards outposts for safety from robbery etc.
5. Construction of bridges.
6. Digging and laying canals and water courses. Putting up dams on canals, and their repairs, salaries of the officials and their establishments of the Irrigation Department.
7. Building inns and mosques.
8. Salaries of *Muftis* (*juris consulti*) and *Qādis*, (judges, magistrates) and other persons engaged in the administration of justice.
9. Salaries of officers of the Police Department.
10. Salaries of school teachers and stipends to students.
11. Salaries and expenses of all those appointed by Government for the enforcement of Islamic *Shari'at*.

The expenditures under the fourth head were as follows:—

Public Health, burial of unclaimed dead bodies, bringing up of unclaimed children, maintaining poor and crippled people deprived of their earnings skill and having none to maintain them.

Imam Muhammad has said that in the utilization of income of the *Bait al-Mal*, the Ruler should have the fear of God. There should be left no one who is needy without sufficient financial assistance. If there is nothing

in the *Sadaqāt*, the propitiatory offerings and there are poor and needy persons who require help, in such an event the Ruler has the power to utilize the income from taxation and meet their needs. This amount shall not be considered liable to be re-imbursed as all kinds of state revenues are also meant to be spent on the needs of Muslims. As against this, when the Ruler has to spend on the armed forces (or on similar item) and there is no fund available under that head he may borrow from the items of *Sadaqāt*, but it shall be treated as loan and shall have to be paid back to the *Sadaqāt* fund on receipt of income in the tribute etc.¹¹³

For the purpose of the estate of a deceased Muslim going to the *Bait al-Māl* if no one, as stated above, is present, the entire Muslim community shall be considered to be entitled to it and the estate shall be placed with the *Bait al-Māl* for the Muslims in need. It is stated by Ibn 'Ābidin that property thus going to the *Bait al-Māl* shall be considered as booty and not as inheritance.¹¹⁴

The question here arises whether the Public Treasury (*Bait al-Māl*) of a Muslim State, in these days, is to be considered as "Managed or un-managed". Some hold that *Bait al-Māl* (for instance, in Pakistan) is "un-managed." Although there are separate heads of incomes in the Public Treasury but their specific character and nature of expenditure, strictly speaking, is not that what it should be in strict accordance with the *Shari'ah*. Further, the officials are *Fāsiq* and unjust and the entitled one's, according to *Shari'ah*, do not get their due rights. According to this writer the Public Treasury that exists today has to be recognised as a "managed" one, for the purpose of escheat. The argument of those who are not in favour of holding the Public Treasury to be "managed", is not justified. In present days, the preparation of the budget, its acceptance by the National and Provincial assemblies elected by the people, arrangements for maintaining separate accounts involving the responsibility of the government and its audit by the public accounts committees are some of the factors that were non-existent in the past. So far as the contention goes that the high officials do freely put the income of the State to improper use, the fact is that these days the affairs of the Government are conducted under well-laid and regulated rules of procedure. The fact that sometimes the treasury's assets are improperly utilized, though a serious crime on

¹¹³Al-Sarakhsi : op. cit., vol. xxx, p. 18.

¹¹⁴*Radd al-Muhtar*, Cairo, 1294 A.H., vol. v, p. 541.

the part of the officials concerned, is not enough to hold the Public Treasury to be "un-managed". One more argument that is found in the books of *fiqh* is that a Public Treasury is to be held as "un-managed" if the Imam (Ruler) is "unjust". Irrespective of the fact as to how far the Imam being unjust, corrupt or cruel can be the legitimate cause of holding the Public Treasury to be "un-managed", it is essential to judge the time and the circumstances wherein our revered jurists laid down the condition of Imam being just, in order to hold a Public Treasury to be "managed". In those days the Imām (Ruler) had complete authority and control over the Public Treasury of the country. He could make proper or improper use of it and there was no institution which could prevent his unrestricted and unlawful mis-appropriation. The jurists, therefore, had laid down the condition of the Imām being just for holding Public Treasury to be managed. But, in the present day even the President or Prime Minister of a country is not entitled to spend freely from the Public Treasury. Even their own salaries, allowances etc. are sanctioned by the National Assembly of the country. It is, however, possible that they may make illegal gains from illegal sources such as bribery, but they, in no way, are entitled to utilise more than a fixed amount from the Public Treasury. In these circumstances, Pakistan's Public Treasury, for example, is to be held as "managed" one. Be that as it may, in the matter of inheritance the Public Treasury cannot be deprived of its right under the *Shari'ah*. The Constitution of Pakistan, 1973 also accepts the right of *Bait al-Māl* to inherit and appropriate the property for which there is no heir or claimant.

What has been stated above is based on the rule of *Siyāsat al-Shar'ī*, because for escheat, State is the claimant. In any case, the Muslim jurists have laid down the following conditions to declare the Public Treasury of a Muslim State as *Shar'i Bait al-Māl* :—

1. There should be maintained separate heads of incomes and expenditures.
2. There should be no head of income which is not warranted by the *Shari'āh*.
3. The nature and character of all expenditures be strictly in accordance with *Shari'ah*. No expenditure be incurred on items which are regarded as illegal by the *Shari'ah*.

4. The State should not have abandoned, without a cause recognized by the *Shari'ah* as just, the collection of *Zakāi*, *Ushr* and *Jizyah*.
5. The Ruler should not be unjust.
6. The entitled ones should be getting their due financial rights from the *Bait al-Māl*.

It may, however, be noted that if any one or more conditions are found present in the Public Treasury of a Muslim State, it will not mean that the said Public Treasury is taken to be as *Shar'ī Bait al-Māl* for all purposes.

CHAPTER XXXVI

The Doctrine of Increase

Section 312. When the rightful shares of the *Dhawi al-furud* as indicated by fractions of the estate exceed, 'Awl (Increase) when added up, the figure one representing the whole estate, then to meet the shares of all the sharers, the number of shares in the property is increased (thereby proportionately reducing each sharer's share), and that "increase" in accounting is called 'Awl.

COMMENTARY

When out of the source, that is, the estate as a unit, shares are to be divided and the shares of all the entitled ones can not be accommodated in the whole estate, the short-fall is made up by the increase of the number of the shares at the source. This act is called 'Awl, (Increase), It is said in *Al-Sirajiyah* that the increase is made with some of its constituents at the source when the source is insufficient for distributing the (required) shares.¹

The literal meaning of 'Awl, is leaning towards tyranny and excesses. In the law of inheritance, when the total shares of *Dhawi al-furūd* exceed the unit one i. e. the estate, reducing the share of each of the heirs and increasing the shares at the source (so that the shares of the heirs may get decreased) is called "Awl". For instance, the deceased leaves behind her husband, two true sisters and the mother. Under the rule of fixed Qur'anic shares, the husband should get one half of the estate, the true sisters should get the two-thirds and the mother should get a sixth share in the estate. But the total of these shares exceeds the unit of one i. e. estate. The problem, therefore, shall require increase of shares from six to eight. In other words, the husband shall get $\frac{3}{8}$, true sisters shall get $\frac{4}{8}$, and the mother shall get $\frac{1}{8}$.

¹Al-Jurjani : opp. cit.. p. 54; Al-Haskafi, 'Alā'uddin (d. 1088 A.H.) : *Al-Durr al-Mukhtār*, o. m. o. *Radd al-Muhtār*, Cairo, 1327 A.H., vol, v, p. 555 :

“العول ان يزداد على المخرج شي من اجزاء اذا ضاق عن فرض”

The Method :

The easiest method of the said 'increase' is to add up the fractions of the shares and equalise its denominator with its numerator. In the above-stated instance, the denominator is '6' and the total of the numerators is '8'. Therefore, the denominator, too, by an increase, would be made up as '8'. Thus the shares shall, in the accounting, become correctly divisible. (By this process, the number of shares is increased to accommodate all the heirs and the quantum is proportionately and justly reduced).

Beginning :

First of all, Ḥaḍrat 'Umar ordered for the adoption of this doctrine of increase (in the number of shares). During his time it so happened that in one case the shares of inheritance of *Ashab al-Farā'id* were exceeding the unit of the estate. He consulted the Companions. Ḥaḍrat 'Abbās Bin Abdul Muttalib advised that the shares be increased. All other Companions agreed with him. The consensus included such eminent jurists-Companions as Ḥaḍrāt Uthmān, 'Ali, 'Abdullah Ibn Mas'ūd. Ḥaḍrat Ibn 'Abbās, however, disagreeing with these Companions does not accept the principle of 'Increase'. Among the Successors, Muhammad b. Ali Ibn Abi Tālib, Ali b. al-Hasan, Zain al-Abidin and Atā Ibn Abi Rabāḥ support him. Abbas Bin Ahmad Al-Hasni Al-Yamani Al-San'āni has written in *Tatimmah al-Rawd al-Naḍīr* that most of the 'Ulama of the *Ummah*, Companions and the Successors are convinced of the correctness of the doctrine and most of Ahl-Bait as well have accepted the validity of the this doctrine. Had the disagreement of Ḥaḍrat Ibn 'Abbas not become well known the absolute '*Ijma* on the question of 'increase' would have been there outright.²

Necessity of 'Increase' :

The necessity of increase arose, as explained by Ḥaḍrat 'Umar, in these words, "I can not ascertain from the Qur'ān as to who of the *Dhawi al-Furūd*, is to be given precedence and who is to be deferred, so that I may give precedence to the one and defer the other".³ Ḥaḍrat 'Umar, therefore, in order to strike a balance among all the *Ashab al-Farā'id* propounded the doctrine of 'Increase'.

²Yusuf Musa : op. cit., p. 320.

³*Ibid*; Al-Sarakhsi : op. cit., vol. xxix, p. 161 :

”لا ادري من قدمه الله فائدة ولا من اخره الله فائده“

View of Ibn Abbas :

Haḍrat Ibn ‘Abbās who, after the death of Haḍrat ‘Umar, differed on the question of ‘increase’, takes the stand in support of his point of view that a *Sahib al-Farḍ* who is ordered by the Qur’ānic text to be given a share, in any case, whether a large one or in other circumstances a reduced one, is a preferential *Sahib al-Farḍ*. God thus gives him the precedence. Then, that *Sahib al-Farḍ* who, after being provided with the fixed share is, under the Qur’ānic text in other circumstances, left to receive an unfixed share, if any, is a weak *Sahib al-Farḍ* and is not given any precedence in inheritance. For instance, the husbands or the wives in the event of there being an issue have their shares reduced from one-half and one-fourth to one-fourth and one-eighth, that is, they are not totally deprived of their fixed shares. Hence, the latter ones shall be relegated in the division of the estate. Thus, according to the assertion of Ibn Abbas, the *Dhawi al-furūd*, whose shares, because of the presence of other heirs, get reduced from fixed shares to another fixed shares, shall be given the precedence, such as husband, wife, father and mother. The *Dhawi al-farūd* who, in some circumstances, are deprived of their fixed shares and left to inherit unfixed shares of those who stand totally deprived of their shares, shall be relegated, such as daughters, sisters, etc., because they are *Sahib al-Farḍ* in some circumstances and ‘*Asbat* in others. Hence the first kind of *Dhawi al-furūd*, shall be given their fixed shares, and the shares of the other kind of *Dhawi al-furūd*, shall be reduced in as much as the *Dhawi al-Furūd* are always given precedence over the ‘*Asbat*.

Hanafis’ Rejoinder :

The Hanafis in reply to the above contention say that all *Dhawi al-Furūd* of whatever category or degree are equal in their entitlement i. e. the *Farḍiyat* capacity. One has no preference over the other because the rights of all of them have been ordained through the Qur’an. Hence all of them shall have equal rights and everyone of them shall get his full share, if possible. If the shares of *Dhawi al-Furūd*, as ordained, cannot be fully met from the estate, the shares of all of them shall be proportionately reduced. To prove the futility of the difference between *Dhawi al-Furūd* and ‘*Asbat* by Ibn Abbas, the Hanafis advance the contention that ‘*Asbat* is the strongest basis of inheritance. Hence, putting one into loss or depriving him on this basis when he is also *Sahib al-Farḍ*, cannot be valid. Rather, the loss that is occasioned due to the insufficiency of the estate ought to be borne, in proportion, by all the entitled ones through the doctrine of ‘*Awl*. This is what appears to be just and proper and what the ‘*Ummah* is acting upon.

It is only in the inheritance of the *Dhawi al-Furūd* wherein the question of 'Awl arises, because 'Asbat inherit only after *Dhawi al-Furūd* have been given their shares. The necessity of 'awl arises because the estate does not suffice for the *Dhawi al-Furūd* entirely. In such situation, the question of giving any share to 'Asbat does not arise at all.

Shi'ah Imamiyah's Practice :

The Shi'ah jurists, to a certain extent, agree with the view of Ibn 'Abbās. If the total of all the shares, according to them, is greater than the unit of the estate, the deduction is made from the shares of the daughter and full or consanguine sister. For instance, the deceased leaves behind the husband, daughter and the father and mother. The husband ought to get one-fourth share. The daughter ought to get half. The father ought to get one-sixth and the mother as well ought to get one-sixth. But the total number of the shares thus allotted rises to thirteen instead of twelve. Therefore, deducting the increase from the share of the daughter, she shall get five ($5/12$) instead of six ($6/12$). Thus the estate being divided into shares, according to Shi'ah, the husband shall get $3/12$, the father $2/12$, the mother $2/12$, and the daughter shall get $5/12$, of the estate and not $6/12$, as she would get normally.

The second instance is as follows. The deceased leaves behind her husband, two daughters, the father and the mother. Normally the husband would get $3/12$, the daughters $8/12$ and the parents $4/12$ of the estate between them. But the total of these shares comes to 15, which is higher by 3. Hence, according to the Shi'ah *fiqh*, deducting from the shares of the daughters the same shall be reduced to $5/12$ of the estate. Thus the entire estate being divided into 12 shares the husband shall get 3, the father 2, the mother 2, and the two daughters shall get 5 shares instead of 8, which will be equally distributed between them.

The third example is where the deceased leaves behind her husband and two true or consanguine sisters. The husband ought to get 3 i.e. the half out of the entire 6 shares and the two true or half sisters ought to get 4, i.e. 4 of the entire shares. But the unit is exceeded by one share. Hence deducting one [from the] share $4/6$ of the two true or half sisters the same shall be reduced to $3/6$ and in the division of 6 shares, the husband shall get 3 and the two true or half sisters shall get 3 shares which they shall divide between them.

Another case is where the deceased leaves behind her husband, a uterine sister and a true or consanguine sister. Here the husband shall get 3 i.e. half of the entire 6 shares, the uterine sister shall get one out of the entire 6 shares, and the true or the half sister shall get 3 shares. But again the unit

of the estate is exceeded by one share. So, one share shall be deducted from the share of true or consanguine sister. Thus, her share instead of $\frac{3}{6}$ shall be reduced to $\frac{2}{6}$, $\frac{3}{6}$ shares shall go to the husband, and $\frac{1}{6}$ to the uterine sister.⁴

Zahiri's Rule :

Allama Ibn Hazm Al-Zahiri has also followed the view of Haḍrat Ibn 'Abbas. In a situation where the husband, sister and the mother of the deceased are present together, according to the Zahiris, after giving half to the husband and one-third to the mother, the residue one-sixth be given to the sister. Had there remained nothing she would have been deprived of her share entirely,⁵ whereas according to the Hanafis the division of shares on applying the doctrine of *Radd* would be thus: husband $\frac{3}{8}$, mother $\frac{2}{8}$ and sister $\frac{3}{8}$.

Consensus of Jurists :

The Companions, the Successors, the Four Imāms, Shi'ah Zaidiyah and the jurists in general fully endorse the doctrine of 'Awl. Imam Sarakhsi, supporting his argument for 'awl, has said, "All these heirs (*Dhawi al-furūd*) are, in their capacity of entitlement, equal in degree. Hence, it is essential to observe equality among them. If the estate is sufficient to meet their respective rights, all of them shall be given their full shares. If, however, the estate is insufficient for all the heirs to be given their full shares, the method of 'awl shall be adopted. A reduction in the shares of all of them, proportionate to their shares, shall be effected. No one shall be totally deprived."⁶

Conclusion :

The opinion of Haḍrat Ibn 'Abbās, apparently, from juristic point of view, deserves attention. He believes in giving preferential treatment to some of the *Dhawi al-furūd*, in accordance with the principle enunciated by him as referred to above. But, the method of determining the stronger and the weaker among the *Dhawi al-furūd* as described by Ibn Abbas or as stated by Ibn Hazm, gets no support from the Qur'ān or the Sunnah.

Besides, a just method adopted for all the *Ashab al-Farā'id* ensures that no decrease is effected in the share of only one heir or one group of heirs and that none is deprived altogether. An equal decrease gets effected in the shares

⁴Tawqir Mirza Rizvi : *Al-Mirōth*, Karachi 1961, pp. 82-82; Al-Hilli : op. cit., vol. ii, p. 201.

⁵Ibn Hazm : op. cit., vol. vi, p. 320.

⁶Al-Sarakhsi : op. cit., vol. xxix, pp. 161-63.

of all the *Ashab al-Farā'id* in proportion to their shares. The method of 'awl, thus, appears to be appropriate and equitable. Just by way of an analogy, debts incurred by the deceased during his sound health are due on him which stand fully proved but his estate is not sufficient for the payment of all the debts of the creditors. In such a case, all the creditors shall be paid after effecting a proportionate decrease in the rights (debts) due to all the creditors; not that some of them shall be totally deprived while some are paid in full and some are paid in lesser amounts. Hence, as long as there is no textual support from the Qur'ān, express or implied, in the matter of determining strength or weakness among *Ashab al-Farā'id*, treating all the heirs on equal footing shall be appropriate, and this is possible only through the applicability of the doctrine of 'awl. Furthermore, the 'awl is a method which has been accepted during the time of Haḍrat 'Umar by all the jurists-Companions. It proves their consensus. Following them the majority of jurists-successors, the Imams of the four noted Schools of *Fiqh* and the generality of 'Ulama possessing vast religious knowledge have all accepted it. From logical point of view, too, this appears to be stronger because in the event of acting on the verdict of Haḍrat Ibn 'Abbas and of Ibn Hazm it becomes unavoidable either to place the entire loss at the account of some *Ashab al-Farā'id*, or to deprive them altogether, without any support from the Book of God. As against this, through the application of the doctrine of 'Awl, this situation does not arise. Rather, each *Sahib al-Fard* gets his share. Any one acting with caution can only thus ensure that all *Dhawi al-Furud* get their full shares or should get them with proportionate reductions in their individual shares. That is why, the adoption of the method of 'awl is quite just and proper. Prof. Coulson also writes about the variant view of Ibn Abbas regarding 'awl, "Although the arguments of Ibn 'Abbas were endorsed by Shi'i law under which, as will be seen, only the portions of daughters or sisters are subject to reduction. Sunni law rejected them and has consistently maintained that the burden of reduction is to be borne rateably by all entitled Qur'anic heirs. 'Awl rests on the view that a Qur'anic portion does not represent an entitlement which is "fixed" in an absolute sense, but one which is "fixed" only in its ratio to other allotted portions. Thus, whether an estate is over-subscribed or not, a daughter's share will be twice that of a son, three times that of a mother and four times that of a wife. "Equity is equality" seems to be the guiding principle here, just as it is in the doctrine of the proportionate abatement of creditors' claims in cases of bankruptcy." (*Succession in the Muslim Family*, Cambridge 1971, p. 48).

Modern Legislation :

Under Section 15 of the Egyptian *Qanun al-Mawarith* of 1943, the law on the subject has been laid down that if the shares of *Ashab al-furud* exceed

the unit of the estate, the division shall be effected in accordance with proportionate decrease in their respective shares by applying the doctrine of 'awl. The same Law has been adopted in Syria (Section 275). Tunisia as well follows the same Law (Chap. 112). In Iraqi Law, although there is no express provision regarding the 'awl, it has been specified therein that in determining the rights of heirs regard shall be had of those directives of the Shari'ah that have been in vogue prior to the enforcement of *Qanun al-Ahwal al-Shakhsiyah*, 1959 (Section 90). Prior to coming into force of the *Qanun al-Ahwal al-Shakhsiyah* in Iraq the rules of inheritance as laid down in the Hanafi and Shi'i Schools of *fiqh* were applicable. Therefore, the doctrine of 'awl still continues to apply there in cases according to each sect. Under Sections 257, 258 and 264 of Moroccan Law of Inheritance different problems regarding 'awl have been stated, which prove that in Morocco as well the doctrine of 'awl is being acted upon in toto.

Indo-Pakistan Courts' Decisions :

The Indo-Pakistan Courts, in the event of the estate exceeding the unit, have adopted the doctrine of 'awl and in this regard decisions have been given in accordance with the Sunni and the Shi'i Schools of *fiqh*, depending on the creed to which the parties belonged.

CHAPTER XXXVII

Inheritance in Special Cases

Section 313. Subject to the provisions relating to children's Inheritance in lineage under Chapter XIII of this Code, for the Special Cases child still in the womb a share equivalent to that of a son or a daughter (whichever is larger) shall be kept in abeyance. This shall be done in case the child in the womb may affect in reduction of the shares of the heirs of the deceased or cause exclusion of some of the heirs of the deceased. If, however, the child in the womb is the cause of total exclusion, the distribution in inheritance shall be kept in abeyance.

Explanation : If at the end of one solar year, after the death of the husband or separation from him, the pregnancy still subsists the said pregnant widow or divorcee shall apply to the Court for her medical examination. The Court shall appoint a Board consisting of four lady doctors to examine her and submit the report to the Court that will decide the matter of the entitlement of the inheritance of the child in the womb

2. The child in the womb shall inherit if it is born alive in full or in more than half of its body. In the event it is born alive in less than half of its body and dead in more than half, it shall be taken to be dead and shall not inherit. But the child in the womb if is mishandled and is born dead, in that event, it shall duly inherit, according to law, and shall pass on inheritance to his own heirs.

3. When the child in the womb is born alive and is heir to the entire share that has been kept in abeyance, the entire share so set apart shall be given to it. If he or she, as the case may be, is entitled to a part of the share kept in abeyance, the residue shall be divided among the other heirs, in accordance with their respective entitlements.

COMMENTARY

The rights of inheritance of those heirs, who, in fact, are alive at the time of death of their ancestor, have been considered in previous chapters. In some cases, however, the proof of actual life and sex of an heir is difficult. Under such circumstances the estate is held in abeyance as indeterminate inheritance. This term covers the estate for a child in the womb, for a person of unknown whereabouts, for an imprisoned person and for an eunuch. The questions regarding lineage of an illegitimate child and one born to an imprecated woman also relate to the form of indeterminate inheritance. They have been dealt with in this chapter.

Inheritance for the 'child in womb' (*foetus*) :

According to all jurists of the *'Ummah* the *foetus* is an heir along with other heirs, provided it is present in the womb of the mother at the time of the death of the ancestor and is born alive.¹ Indeed there is difference of opinion on the point as to the maximum time-limit within which it is born alive after the death of the ancestor. There is also a difference of opinion about the maximum period of gestation as to the rule of inheritance applicable to a child in womb (*foetus*) born to the wife of the deceased whose estate is to be divided and to any other female heir of the deceased.

Minimum Period of Pregnancy :

The shortest period of pregnancy is held to be of six months. There is consensus of the *'Ummah* on this. It is based on the following two verses of the Holy Qur'ān, namely, "حمله و فضاله ثلاثون شهراً" i.e. the carrying of the (child) to this weaning is (a period of) thirty months (S. XLVI : 15), and "وفضاله في عامين" i.e. and in years twain was his weaning (S. XXXI ; 14). Taking the above two verses together the conclusion arrived at is that the total period of pregnancy and suckling the child is of thirty months, and the suckling period only is for two years. In other words, the longest period for suckling is of twenty four months and the rest of six months is the period for pregnancy. On a close study of these two verses the fact also emerges that God, at first, informed us about the periods of fosterage and pregnancy both taken together. But as there could arise a doubt about the correct period of suckling because of the uncertainty of pregnancy period, God, therefore, in order to remove that doubt revealed another verse and the maximum period for fosterage has then been fixed up. Thus, in another verse (S. II : 233), too, it is laid down that those who want to suckle their

¹Al-Sarakhsi : op. cit., vol. xxx, pp. 50-51.

children for the natural period of time, for them, the maximum period is that their mothers suckle their children for complete two years.²

Here the question arises: When God has fixed the maximum period for fosterage in the manner stated above, whether the period of gestation as thus arrived is the minimum one? Apparently, there is no mention in the verses from which the rest of the period (six months) may be held to be the minimum period of pregnancy. It is on this ground that *Zāhiris* who base their views on the apparent meaning of the Qur'ān, hold six months to be the period of gestation. They, in this connection, do not appear in favour of fixation of the minimum or the maximum period. Although the period of six months for gestation does not appear from the words of the Qur'ān as minimum, but it is reported from Ḥaḍrat Ibn 'Abbās that the minimum period for gestation is of six months.³ Ḥaḍrat 'Alī also argues likewise and Ḥaḍrat 'Uthmān so holds also.⁴ It is also reported from Ḥaḍrat Ibn 'Abbās that God has fixed the entire period of gestation and fosterage as thirty months. Thus, if a woman gives birth to a child in nine months, suckling the child for a period of twenty one months should be enough. So, when the child is born in seven months, the period of suckling is twenty three months and when it is born in six months the period of suckling is completed in two years.⁵ However, through these traditions it is well established that God has, if not prescribed, at least indicated the period of six months to be the minimum period of gestation. The consensus of the Companions of the Prophet as well supports this view.

Maximum Period :

Ḥanafī Rule of Conduct: According to the Ḥanafis, the maximum period of pregnancy is of two years. If the pregnancy is that of the divorced wife or that of the widow, the condition is that the woman must not have admitted the lapse of her term of probation ('*iddat*'). If she has admitted such lapse and the child is born thereafter (though the birth may have taken place within two years) its lineage shall not be established from the deceased and the child shall not inherit from him, in as much as after the admission of the lapse of the term of probation by the woman, the conception cannot be deemed to be by the deceased. The basis of the principle is that "what is

والوالات يرضعن اولادهن حولين كاملين لمن اراد ان يتم الرضاعة²

³Ibn Kathir : *Tafsīr* (Urdu Tr.) pt. xxi, p. 45.

⁴*Ibid*, pt xxvi, p. 8.

⁵*Ibid*.

lapsed cannot be revised and what is past cannot sustain an argument⁶. Imām Abū Ḥanīfah, Ṣāḥibain and all other Ḥanafi jurists are in complete agreement on this question.

Māliki and Shāfi'i Views : According to Imām Mālik and Imām Shāfi'i the maximum period of pregnancy, in accordance with their authentic view, is four years. Ibn Rushd has reported a statement of Imām Mālik giving the period as five years also. Some Māliki jurists believe the period to be seven years as well. But Muhammad b. Abdul Hakam, a Māliki jurist, believes the maximum period to be one year only. Ibn Rushd has formed his personal view agreeing with the finding of Ibn Abdul Hakam, as the usual period of pregnancy.⁷

Hanbali Rule : In accordance with a well-known statement of Ahmād b. Hanbal the maximum period of pregnancy is four years, although one of his reported statements is in accordance with the Hanafi rule of conduct also, i.e. of two years.

Some other opinions: Besides the views of the above-mentioned Schools of *fiqh*, Laith b. Sa'd holds the maximum period of pregnancy to be three years. According to 'Ubād b. 'Awām it is five years. Ibn Shihab Zuhri, however, holds, it to be five years but according to another report it is seven years.⁸

Shi'ah Imamiyah View : See Vol. 1, p. 696 of this Code.

Zāhiri Rule : Imām Da'ūd b. Ali al-Zāhiri, the initiator of Zāhiri *fiqh* has held the period of pregnancy to be of six months.⁹ He, in fact, bases his view on the apparent text of the Qur'ān referred to above. As the Zāhiris do not believe in giving consideration to the rationale of any Qur'anic text, they go with the apparent meaning of the Qur'anic text. But, if their argument regarding the maximum period of pregnancy is accepted to be correct, it shall necessarily follow that the Qur'ān, God forbid, is conveying a wrong information because children are seldom born at only six months of pregnancy. The argument of Zāhiris is thus not acceptable at all.

⁶Al-Jurjani : op. cit., p. 32; Al-Kasani : op. cit., vol. iii, p. 212; Al-Sarakhsi : op. cit., vol. xxx, pp. 50-51; Ibn al-Humam : op. cit., vol. iii, p. 310.

⁷Ibn Rushd : op. cit., vol. ii, p. 358 :

”وقول ابن عبدالحكم والظاهرية هو اقرب الى المعتاد، و الحكم انما يجب ان يكون بالمعتاد، لا بالنادر ولعله ان يكون مستحيلاً“.

⁸Al-Maqdisi, Ibn Qudamah : op. cit., vol. vii, p. 477.

⁹Ibn Rushd : op. cit., vol. ii, p. 258.

Rationale of Hanafis View : In support of the maximum period of pregnancy being two years, the Hanafis put forward Ḥaḍrat 'Āishah's tradition, viz. "The child does not stay in the womb of its mother a moment later than two years." Dār Qutni and Baihaqi have recorded this tradition in their "Sunan".¹⁰ The words "ظل مغزل" are a metaphorical reference to "shortness of time". The Hanafis maintain that the words of Ḥaḍrat 'Āishah should be taken to be based on her knowledge from no one but the Holy Prophet himself. It is not possible to take it as her personal opinion as in such legal matters personal opinion has no place. Rather, in the matter of such provisions of the Shari'ah the assertion of a Sahābi or Sahabiyah (Companion of the Prophet) shall be accepted to be based on the knowledge derived from the Prophet himself.¹¹ (Also see Vol. I, p. 694 of this Code).

Reasons for other Views : Imams Malik, Shafi'i and Ahmad Ibn Hanbal, in support of their views, rely on some cases by way of proof. Thus the following is reported from Walīd Bin Muslim. Walīd said: "I related before Imam Malik the tradition wherein Jamīlah Bint Sa'd had reported from Ḥaḍrat 'Āishah that no woman could remain pregnant for more than two years, Imam Malik said Good God! who could say that, my neighbour, the wife of Muhammad b. 'Ajlān remained pregnant for four years".¹² This instance has also been cited by Imam Shafi'i, Imam Ahmad Bin Hanbal as well has stated about 'Ajlān that the women of the 'Ajlān tribe have remained pregnant for four years. 'Ajlān's wife gave birth to three children

¹⁰Dār Qutni : *Al-Sunan*, Medina, pt. iii. 321-22 :

"من طريق ابن المبارك ثنا داود بن عبد الرحمن عن ابن جريح عن جميلة بنت سعد عن عائشة قالت: "الولد لا يبقى في بطن امه اكثر من سنتين، ولو بظل مغزل".

Al-Baihaqi : *Al-Sunan al-Kubra*, Deccan, vol. vii, p. 443; Al-Zail'i, Abdullah b. Yusuf, (d. 762 A.H.): *Nasab al-Rayah*, Cairo, vol. iii, pp. 264-55 (chapter on الثبوت النسب)

¹¹Al-Kasani : op. cit., vol. iii, p. 211; Ibn al-Humām : op. cit., vol. iii, p. 301; Damād Afandi : op. cit., vol. i, p. 474.

¹²Al-Maqdisi, Ibn Qudamah : op. cit., vol. vii, pp. 477-78 :

"قال قلت : مالك بن انس رحمة الله عليه حديث جميلة بنت سعد عن عائشة لا تزيد المرأة على السنتين في الحمل، قال مالك : سبحان الله من يقول هذا ؟ جارتنا امرأة محمد بن عجلان تحمل اربع سنين قبل ان تلد".

Al-Zail'i : op. cit., vol. iii, p. 265.

and each time she had a pregnancy of four years and so was the case with Abdul Aziz Mājishuni and his family. Similarly, Muhammad b. Abdullah b. Ali remained in womb of his mother for four years. Abu al-Khattāb has narrated the same about Ibrahim b. Najīḥ al 'Uqaili. The same has been reported from Ḥaḍrat 'Ali as well.

Imam Malik and Imam Shafi'ī have argued from these cases as well as the case of Ḥaḍrat Ḍaḥāk that he was born after two years of pregnancy. (In a report it is three years). He had his teeth at the time and had learned laughing too. That is why, he was named "Ḍaḥāk". Similarly, several issues in his family were born after four years of pregnancy. There is another report too that a certain husband remained absent from his home for two years. When he returned he found his wife to be pregnant. Ḥaḍrat 'Umar intended to punish her to "*Hadd*". Ḥaḍrat Mu'adh told him that he (the Caliph) certainly had the authority to award the punishment of "*Hadd*" against her, but he had no authority to kill the child in her womb. Consequently Ḥaḍrat 'Umar kept his order of "*Hadd*" suspended. When the woman gave birth to the child it had teeth and resembled to its father who exclaimed, "By God ! the child is my son". Ḥaḍrat 'Umar, therefore, accepted the lineage of the child as proved with that person, inspite of the fact that the child took more than two years to its birth. He said "Had Mu'adh been not there, 'Umar (because of the execution of *Hadd* punishment during pregnancy) would have been ruined." (Also see vol. I, page 695 of this Code.

Hanafis Rejoinder : On behalf of the Hanafis the answer to the argument based on the cases cited by the three Imams has been given that to the case of Ḍaḥāk and 'Abdul Aziz there is no knowledge or report from them directly. Mere information given by others regarding some event is no proof of the same, in as much as what is there in the womb no body knows except God, the Almighty. Secondly, such an event may also take place because of some illness, or because of the womb getting blocked or due to some other disease or peculiarity. These happenings shall, therefore, be considered to be rare and exceptional and shall not be held to be the basis for the rule.

The answer to the narrative regarding the absent husband quoted above has been given by the Hanafis that in this case the acknowledgement of parentage by that person has been held to be the proof of legitimacy of the child.¹³ Moreover, Ḥaḍrat 'Umar's narrative (in proof of the period of pregnancy being for more than two years) is unacceptable from juristic point

¹³ Al-Jurjani : op. cit., p. 130.

of view. It is strange as to how Hadrat 'Umar might have intended to execute the "*Hadd*" against that woman when she had neither admitted the commission of adultery nor was there available the evidence of four eye witnesses in proof of the commission of offence. This position could not be correct under the law. The expression of mere doubt by the husband regarding the commission of adultery by his wife cannot form the basis of passing an order of *Hadd* against her. How could Haḍrat 'Umar intend to pass an order of '*Hadd*' against that woman merely on the expression of doubt by the husband especially when the provision of *li'ān* was also available to him. Hence, this narrative is no argument in support of Malikis and Shafi'is rules of conduct, regarding the question of the maximum period of pregnancy possibly being of more than two years.

The Hanafis in answer to such instances also argue that the assertions of 'Āyishah in the tradition narrated by her shall be deemed to be attributed to the 'Law-giver' himself (*Ṣallallahu 'alaihi wa sallam*), wherein there is no possibility of error. This tradition shall be held to be as proof (in a higher degree), compared to the stated instances. Irrespective of this, if the cases cited by Imam Malik be taken to be correct, it cannot yet be held to be absolutely proved that the maximum period of pregnancy is four years. At best this instance (or such instances) may be said to be exceptional, whereupon the legal rule cannot be based. Whereas, the basis of the period of "two years' pregnancy" is, to say the least, the relic of a jurist Saḥābiyah and such narrative of Sahābi or Sahābiyah wherein some legal postulate is propounded, is placed on a higher degree as against the above-stated views of the Imams. This so because these views are merely based on the case which do not even have the authority of a weak tradition.

Similarly, medical experience and observations being changeable and variable cannot be held to be a sound basis for *Shari'ah* Law, specially when physicians' experiences have also remained at variance. Some physicians have also observed the child birth taking place after fifteen and sixteen months, which is a period of nearly one and a half year.

Most of the Doctors of *Hadith* and *Fiqh* are agreed that basing the *Shari'ah* dictate on the statement of a Companion of the Prophet is more authoritative and mandatory compared to presumptions. Hence regarding the principles of *ijtihad* of Imam Abu Hanifah, Ibn Abdul Bir as reported from Sufyan Thawri stated, "I have heard Imam Abu Hanifah

saying that he, as the first source of the '*Shari'ah* dictate', takes the Book of God. When he does not find the '*Shari'ah* dictate' in the Book of God, he adopts the traditions of the Prophet. When he does not find '*Shari'ah* dictate' in the Book of God and in the traditions of the Prophet, he accepts the assertion of the *Ṣahabah* (Companions) of the Prophet. If there are several assertions of the *Ṣahabah* and they are at variance with each other, he adopts the assertion of the *Sahabi* whichever he himself prefers, but he does never deviate from the assertion of a *Sahabi* to accept the assertion of a non-*Ṣahabi*.¹⁴ That is to say, Imam Abu Hanifah, after the Book and the Tradition, holds the assertion of *Ṣahabah* to be the basis of '*Shari'ah* dictate'. Thus, on some point of *Shariah* Law, if there is no dictate in the Book of God and the tradition but there is an assertion of a *Sahābi*, then, the same shall be the final proof. The assertion or opinion of a non-*Ṣahābi* shall not, in such a case, be relied upon at all.

Imam Qarshi in a foot-note on *Al-jawahar al-Muḍī'ah* as well has said that Imam Abu Hanifah followed *Ḥadith Ṣahih*. In the absence of *Ḥadith Ṣahih*, he followed the narrative of *Sahābah* or *Tabi'un*, if there was one. In the absence of *Ḥadith Ṣahih* or the assertion of a *Sahābi*, he acted upon *Qiyās*. There is no better argument than the assertion of a *Sahabi*, where *Qiyās* has no place.¹⁵ It is also stated in '*Usul Al-Sarakhsi*' that there is no difference between our earlier and the later jurists on the point that in cases where *Qiyas* is not applicable as the source of *Shari'ah*, the assertion of anyone of the *Sahābah*, according to us, is the final proof thereof. Same in the matter of legal quantities (*maqāḍīr shar'i*) which cannot be decided according to jurists' opinions. That is why we adopt the assertion of *Hadrat 'Ali*, that the least quantity of dower is ten *Dirhams*. We also adopt the assertion of *Anas* that the least period of menstruation is of three days and the longest is of ten days. We also adopt the assertion of *Uthman B. Abi al-'Ās* to the effect that the period of

¹⁴*Al-Intifā'*, Cairo, p. 142 :

” ابن عبد البر في الانقضاء عن سفیان الثوري قال : سمعته (ای الامام ابی حنیفة) يقول : أخذ بكتاب الله فمالم اجد فبسنة رسول الله صلى الله عليه وسلم فمالم اجد في كتاب الله ولا في سنة رسول الله صلى الله عليه وسلم اخذت بقول اصحابه أخذ بقول من شئت منهم وادع من شئت منهم ولا اخرج من قولهم الى قول غيرهم“.

ذكر القرشي في ذيل الجواهر المضيئة : وكان الامام (وابو حنیفة) اذا وردت مسئلة فيها حديث صحيح تبعه ولو عن الصحابة والتابعين والاقاس- فاحسن القياس الاحتجاج يقول الصحابي فيما لا يدخل فيه للقياس“.

parturition bleeding (*nifās*) is of forty days. Regarding the highest period of pregnancy Hadrat 'Aishah's assertion of two years has thus been finally adopted, reason being that no one can presume mere idle talk from her in a positive assertion. Hence, in the matter of '*Shari'ah* dictate' it is not proper to take her assertion to be mere idle talk."¹⁶

'Allamah Bazdawi, in the chapter "*Mutabi'at al-Sahabah*" of his book, "*Usul*", (generally known as *Usul al-Bazdawi*) writes that Burda'i has said," To follow the *Sahabah* is obligatory and, therefore, *Qiyās* shall be given up. Imam Karkhi has said, 'Following the *Sahabah* is obligatory but it is so in questions where the '*Shari'ah* dictates' cannot be ascertained through *Qiyas*." Allamah Bazdawi has further said, "However, when a question cannot be settled through *Qiyās* (presumption) then acting on the assertion of *Sahabah* on that question is essential and the assertion of *Sahabah* shall be taken as having been heard from the Prophet. Hence, acting on his assertion shall be obligatory".¹⁷

Consequently, according to the most of the Doctors of *fiqh* and jurisprudence, it is an agreed rule that in matters concerned with '*Shari'ah* dictates', the assertion of *Ṣaḥābi* instead of being taken as his own shall be considered to be based on his hearing of it from the Prophet himself.

According to the Hanafis the assertion of Hadrat 'Āishah, on the question, because of another argument as well, may be held to be final. The argument is that in the Qur'an God says, "Have we not created you from a fluid (held) despicable? The which we placed in a place of rest, firmly fixed, for a period (of gestation) determined (according to need)" (S. LXXVII: 20-22). This verse of the Qur'an, as to the fact of how long the child shall stay in the womb of the mother, is unspecific. It is, however, an accepted principle, according to all the Imāms that a dictate of the Qur'an, if unspecific, (*mujmal*), its explanation or elucidation may be had through a tradition with a solitary report "*خبر واحد*". But if the dictate is absolute, (*muṭlaq*), according to the Hanafis, it cannot be made applicable to only one set of circumstances by a solitary report. There is a consensus among the Hanafis on this principle. The other Imāms, however, hold that in the case of an absolute dictate as well, a single reported information (*خبر واحد*) can be accepted as its commentary and explanation

¹⁶Al-Sarakhsi: *Al-Uṣūl*, Cairo, 1372 A.H., vol. ii, p. 110.

¹⁷Al-Bazdawi (d. 482 A.H.): *Uṣūl*, Karachi, pp. 234, 336.

and its applicability can be limited to one situation. The above-mentioned assertion of Haḍrat 'Āishah is in the degree of a 'single information', a solitary report and it is in the nature of commentary and statement of the unspecific matter mentioned in the above-stated verse. The tradition, though *mawqūf*, an assertion of a Saḥābiyah, in legal terms, it is in the degree of *marfu'*, related to the holy Prophet. As a matter of rule, legal quantum cannot be fixed through *Qiyās* but they depend on 'Divine revelation'. Haḍrat 'Aishah, therefore, could not have interpreted the unspecified period in the Qur'ānic verse merely on her own to be of two years, unless she would have heard it from the Prophet himself, the Hanafis conclude.

Medical Views : See Volume I, pp. 702-3 of this Code.

Analysis :

The contention of the Hanafis, in the matter of fixation of the maximum period of pregnancy, is that in matters involving purely a *Shari'ah* question, wherein *Qiyās* is not applicable and no directive from the Qur'ān or Sunnah (tradition) of the Prophet is available, the assertion of a Saḥābi (Companion of the Prophet) shall be the decisive factor. The question, however, is that the fixation of the period of pregnancy is a factual matter not a pure question of *Shari'ah*, though the dictates of *Shari'ah* shall apply to it. The **argument** of the learned jurists that the matters wherein the number or **quantity** are concerned the dictates of *Shari'ah* are obligatory cannot guide us satisfactorily so also the rule that assertion of a 'Sahabi' shall be accepted as the final proof thereof does not seem to be quite correct. It, however, cannot be disputed that some matters respecting quantities are purely *Shar'i* e.g. the number of prayers and fasting and the timings of the prayers etc. Simple rationalism, on principle, has no place in their appreciations as the *Shar'i* quantum is based on the teachings of the law-giver. But some **matters** respecting quantum are matters of physical fact though the dictates of *Shari'ah* apply to them. Such matters for consideration which are physical and factual their method of appreciation should be the actual observations. The period of pregnancy, thus, is such a question of physical appreciation, the knowledge whereof, on principle, can be gained through observation. When the period of pregnancy is fixed through observation, the relevant provisions of *Shari'ah* shall be applied thereon. This question is similar to that of *Shari'ah* rules regarding gift made during death-illness. It is a dictate of *Shari'ah* that donor's gift made during death-illness shall be

governed by provisions relevant to the law of Wills. But which illness is the death-illness, it can only be determined through medical science. As the fixation of the term of the period of pregnancy rests on those matters that depend on physical observation, presumption, *Qiyās* should be applicable about it. That is why, the assertion of Sahabi or Sahābiyah in this matter should not be taken as final rule. The difference really lies in the fact whether the fixation of the period of pregnancy is a matter of presumption (*Qiyās*) or otherwise. In other words, does it depend upon observation, experience and medical science or not? The Hanafis include it in matters wherein no presumption applies. The three Imams include it in such matters wherein presumption intervenes. The Hanafis hold it as governed by the tradition of Haḍrat 'Aishah, whereas the three Imams regard the said assertion as merely the personal opinion of Haḍrat 'Aishah.

Islam under its basic ethical conceptions accepts even ordinary proof in holding the children to be legitimate. This ensures a number of social benefits and protections. Under Islamic law, therefore, even the irregular marriage contract and *wati bil-shubha* (intercourse with a woman mistakenly thought to be his wife) have been held to be the proof of the lineage and legitimacy of children.

The words of the Prophet, “الولد للفراش وللعاهر الحجر” have the character of a foundation. The jurists of the *Ummah*, therefore, have paid their full attention to the fact that the children be held to be legitimate. In this context, when the question of the maximum period of pregnancy is considered it is realised that the jurists have kept in view remote cases of contingencies as well. Thus, according to us, basing this question on the above mentioned tradition narrated by Haḍrat 'Aishah seems to be proper. In holding the maximum period of pregnancy to be of two years the advisability is that giving birth to a child by a woman in more than one year (which may extend to two years) shall not by itself be the proof of illegitimacy of the child. The birth of a child within the usual period is indeed a question which is against common occurrence, and special provisions, for that, shall have to be looked for. If, however, the question of the period of pregnancy be accepted to be based on presumption only, then the fixation of the period of one year will be correct. But it is equally an established fact that the instances of child-birth exceeding one year have also been observed. Hence in order to put a check to an illegitimate child getting inheritance from the deceased it has been provided as a condition that the pregnant woman be the wife of the deceased and she should not have admitted the lapse of her

term of probation. In the case of any other woman, the period of pregnancy is of six months only from the death of the deceased ancestor. (Also see Vol. I, pp. 703-4 of this Code).

Modern Legislation :

Under the Inheritance laws of Egypt (Sec. 15), of Iraq (Sec. 51), of Tunisia (Sec. 71), of Syria (Sec. 128) the period of pregnancy has been fixed, in the least to be six months and at the most to be one year. That is to say, the assertion of the Māliki jurist, Abdul Hakam has been adopted. In these countries the question has been held as based on *Qiyās* and medical observations and experiences. The Moroccan Law, however, provides that if at the end of the year, a doubt persists regarding pregnancy, the interested party shall bring the matter to the notice of the Court so that the assistance of medical experts may be had for a solution. The Jordanian and Iraqi Laws of 1951 and 1959 respectively, however, do not prescribe any maximum period of gestation. (Also see Vol. I, pp. 696-97 of this Code). Prof. Coulson in his book "Succession in the Muslim family, (p. 23) writes : "Contemporary medical science, of course, generally regards one year as the absolute limit of pregnancy. But in the more conservative areas of Islam, such as Nigeria and Saudi Arabia, the excessively long periods of gestation recognised as possible under traditional *Shari'ah* law are still very much of a reality both in popular belief and in judicial practice. In 1948, for example, the High Court of Mecca held that a pregnancy had lasted for almost six years. The case appears as No. 328 in Vol. 5 (1368 A.H.) at pp. 15-17 of the handwritten record of cases heard by the High Court. Khadijah had been finally divorced by her husband Sālih four months after the birth of a child. Five years and nine months after this divorce Khadija gave birth to another child. She claimed that she had been pregnant at the time of the divorce and that she had continued in her '*iddat* until the birth of the child. Accepting this claim, the Court adjudged the child to be the legitimate child of Sālih. In this case the Court held that the traditional Hanbali rule which sets the maximum period of gestation at four years was not applicable, on the ground that the fact of Khadijah's pregnancy at the time of her divorce was established. Events subsequent to this case are of some interest. Khadija had re-married and asserted that she had been pregnant by her husband Sulayman for more than nine months. Sulayman admitted that this was so and the Court issued a decree of prospective paternity, attributing Khadijah's child, whenever it should be born, to Sulayman. In 1959 Khadijah's married sister, Ruqayyah, also claimed to have been pregnant for much longer than nine months. This was supported by the evidence of a midwife and accepted to be so by Ruqayyah's husband. The High Court of Mecca again issued a decree of prospective paternity, attributing Ruqayya's child, whenever it

might be born, to her husband. This case appears on the record of the High Court as No. 1144, Vol. 16 (1379 A.H.) at p. 36." (Also see the booklet : "القول الحق في امد لحمل المحقق" by Muhammad Mustafa b. Imam b. Abdul Qadir Alvi al-Shanqīti, Mecca, 1369 A.H., wherein the author has stated a number of cases of the existing women of Mecca and Medina, Tā'if and Egypt who remained pregnant for periods ranging from five to eighteen years).

Pakistan Law :

In Pakistan under Section 112 of the Evidence Act, 1872, regarding the presumption of legitimacy the fact of birth of the child during the existence of a valid marriage contract or within 230 days from the termination of that marriage contract has been held to be the proof of the fact that the child is the issue of the husband. Under the law, the minimum period of pregnancy has, however, not been fixed. Prof. Coulson thus writes "The law currently applicable in India and Pakistan in this regard (as a result of the Evidence Act, 1872) is distinguished by the fact that the presumption of legitimacy arises in favour of a child 'born during the continuance of a valid marriage'. This means that the paternity of a child born a matter of weeks or even days after marriage will be attributed to the husband. Thus, the six months' rule of traditional Shari'ah law, which is still observed throughout the Middle East, is no longer applicable in India and Pakistan. Under the Indian Evidence Act, a child born more than 280 days after the termination of a marriage will not be presumed to be the legitimate child of the husband—although this does not preclude the court from adjudging such a child to be legitimate on the basis of medical or other evidence by the party who seeks to establish legitimacy. Finally, under the Evidence Act, a claim of paternity may be rebutted by proof of non-access at any possible time of conception of the child." (ibid, p. 28) For author's criticism on this provision of Evidence Act, 1872 see Vol. I, pp. 697-702 of this Code.

Heirship of 'Child in womb' :

According to the Hanafis unanimously, if a person dies leaving his wife pregnant at the time of his death, in the event of the child being born within two years, the child shall be the heir of the deceased provided the widow has not admitted the lapse of her term of probation. If, however, the child is born after the expiry of maximum period of pregnancy, or the woman admits the lapse of her term of probation within two years, the fact shall get established that the child at the time of death of the deceased was not in the womb. Hence neither his lineage shall get established nor shall he get the inheritance. This is a case when the child is born to the widow of the

deceased himself and the marriage contract between the two be subsisting at the time of death of the deceased. Same in the case with the divorcee of the deceased.

If the pregnancy be not of the widow of the deceased himself but it be the pregnancy of the wife of the heirs of the deceased such as the wife of the father, grandfather or any other female heir be pregnant at the time of death of the deceased and she, in complete six months or in a lesser period from the death gives birth to a child, the child, in that event, shall be the heir of the deceased and it shall be considered that the child existed in the womb at the time of the death of the deceased. If the child of that woman (other than the wife of the deceased) is born in more than six months' period, according to the Hanafis, he shall not be the heir because there remains no certainty of his being present in the womb at the time of the death of the deceased.¹⁸ (There is a possibility that she may have become pregnant after the death of the deceased). The difference in the maximum period of pregnancy between the widow of the deceased and the wife of another person (heir of the deceased) for the purpose of inheritance, according to Hanafis, is however, based on the principle of *Qiyas*.

Share for 'child in womb' :

There is a difference of opinion among the Imāms on the question as to what share in the estate should be kept in abeyance for the child in womb. This difference of opinion is not only found between Imam Abu Hanifah and Shāhibain but is also found among the other three Imāms.

The Jurists differ on the point that if a person dies leaving behind his wife pregnant, what part of his estate shall be kept in abeyance for the 'child in womb.' According to Imam Abu Hanifah the shares of four male or four female children, whichever be greater, shall be kept in reserve for children in the womb. The reason seems to be that Imam Abu Hanifah had the actual experience of four children being born from one pregnancy. Imam Khassāf has reported the view of Imam Abu Yusuf that, out of the estate, the share for a son or for a daughter, whichever is greater, shall be kept in abeyance for a child in womb. Another reported view of Imam Abu Yusuf is that the shares for two male children or two female children whichever be greater, shall be kept in reserve. A similar view of Imam Muhammad al-Shaybani has also been reported.

¹⁸Al-Sarakhsi, *al-Mabsūṭ* : op. cit., vol. xxx, pp. 50-50.

From the two above-stated opinions of Imam Abu Yusuf the assertion, "Out of the share for a son or for a daughter whichever is greater shall be kept in abeyance", is correct and accepted as a verdict because only one child is born from most of the pregnancies. Thus, if a person dies leaving his wife pregnant and the estate is divided before the delivery of the pregnancy, in that case, the 'child in the womb' shall be supposed to be a son or daughter whichever is better in the existing circumstances. That is to say, if by supposing it to be a son, it gets the greater share, it shall be held to be a son and its share shall accordingly be reserved, and if it gets the greater share by supposing it to be a daughter it shall be held to be a daughter, and its share shall accordingly be reserved. For instance, a person dies leaving behind a son and a pregnant wife. If the 'child in the womb' is supposed to be son, in that case, after giving the one-eighth share to the wife the two sons become the equal co-sharers in the remainder. If the child in the womb is supposed to be a daughter, after giving the one-eighth share to the wife, the daughter shall be entitled to one-third in the remainder. Thus, in the above case, by supposing the child in the womb to be a son, it gets a greater share. It shall, therefore, be supposed to be a son and his share shall be kept in reserve accordingly. As against this, a woman dies leaving behind mother, husband, uterine sister and a pregnant stepmother. In this case, if the child in the womb is supposed to be a female i. e. the consanguine ('*Allāti*') sister, she in the capacity of *Dhawī al-furūd* shall be entitled to half of the estate. If it is supposed to be a male i. e. the consanguine ('*Allāti*') brother, he being the '*Asbah*' shall be entitled to a lesser share. Hence in the above-stated case the child in the womb shall be supposed to be the consanguine ('*Allāti*') sister, and one half share in the estate shall be reserved for her.

According to Imam Shafi'i, in case of pregnancy, no heir shall be given the share and the estate shall be kept intact pending delivery of the child but a particular heir, whose share does not get changed because of there being a child apparent in the womb, whether a male or a female, or more than one child in the womb, may be given his fixed share.

The four Imams are unanimous in holding back the share for the 'child in womb'. The difference lies in the quantity of the share to be withheld. According to the assertion of Imam Shafi'i (reported by Ibn Rabi') the quantity of share of four children shall be withheld. According to another Shafi'i view, if there is, however, such other heir of the deceased who is entitled to a fixed share in any case, then after giving him his share, the

remaining estate shall be kept in reserve. If the heir is such whose share is not fixed, the entire estate shall be kept undivided till the child in womb is delivered.¹⁹ Imam Mālik agrees with Imām Shāfi'i.²⁰ According to Imam Ahmad b. Hanbal, if the quantum of two son's share is larger, then the shares of two sons shall be withheld out of the estate. If the quantum of two daughter's share is greater, the same shall then be withheld.²¹

Conclusion : It seems to be correct that for reserving the share for a *faetus*, it is absolutely necessary to have regard to the presence of other heirs and of the degree and nature of their relationship. It will also have to be seen whether because of the birth of a son or daughter is there a possibility of total deprivation or partial deprivation in determination of shares. Consequently, having regard to these matters in question, the quantum in estate should be kept in abeyance accordingly. But keeping in abeyance the distribution of the entire estate is generally injurious. However, in some unavoidable circumstances, the distribution of the entire estate may be withheld, otherwise the share of one male or female, whichever gets greater, should be kept in abeyance.

Condition for Inheritance :

Hanafis' Rule: According to the Hanafis, the basic condition for the inheritance by 'child in womb' is that it be born alive. The test of its being born alive is that it produces sound, whether it cries or sneezes. If a certain part of the body of the child comes out and it has movement, thereafter, greater part of its body comes out and it has movement it would be said to be the proof of its being alive. If a smaller part of the body comes out and one of its limbs has movement it would not be the proof that it is alive. If more than half of it comes out alive and thereafter it dies, it shall inherit because greater part of the body shall be taken as 'whole'. To determine the greater or smaller part of the child the rule is that if the child is born straight i.e. if the head of the child comes out first, its coming out till its breast shall be considered the egress of the most part of it. Lesser than that shall be considered the egress of the small part of it. If it comes out from legs' side first, its coming out till its navel shall be considered the egress of the most part of it. If it does not

¹⁹Al-Firozabadi : op. cit., vol. ii, p. 32.

²⁰Al-Abi : op. cit., p. 239.

²¹Ibn Qudamah, Al-Maqdisi : op. cit., vol. vii, p. 195.

come out till its navel, it shall be the smaller part.²² If a pregnant woman is struck at her womb and her pregnancy terminates, 'the child in womb' shall be held as one of the heirs, for its death was caused by the blow which is a *Jināyat* (offence), otherwise it would be deemed to have born alive. So it shall inherit and shall be inherited from.²³

The rule of the other three Imāms : The other three Imams (i.e. Malik, Shafi'i and Ibn Hanbal) also hold the condition of child in womb being born alive as a condition precedent for its getting the inheritance. According to all of them the child shall be considered alive when it takes birth fully crying. But merely the prurience of some limb and its emitting of sound, the presumption for its being alive shall not arise and it shall not inherit.

The Zāhiris' Rule : According to Zāhiris, the child that is born alive, in any manner, after the death of its ancestor, shall be the heir, whether its greater part is born alive or the smaller, and whether it produces any sound or not. Even if only its eyes or the hands or any part of the body moves which is the proof of life, the child shall be held as born alive and it shall be the heir.²⁴

The Shi'ah Imamiyah : According to Shi'ah Imamiyah, if the child is born alive or the mother aborts without the meddling or because of meddling by others, but after its birth it acts as a living one, in such circumstances, it shall be the heir. However, if it be alive by half and dead by another half, it shall not be the heir. Same is the rule when body of the child moves about like the body of the slaughtered (throbbing and witching). Such a child shall not be the heir.²⁵

Modern Legislation :

It has been provided in the Egyptian Law No. 77 (Section 42-44) that for 'the child in womb' the share for either the son or the daughter, whichever is greater, shall be withheld. In the Egyptian Law, a difference for the purpose of inheritance in the period of pregnancy of the wife of the deceased himself and of another heir has also been observed. If the

²²Al-Jurjani : op. cit., p. 134; Ibn Nujayym : *Al-Baḥr al-Rā'iq*, Cairo, 1334 A.H., vol. viii, p. 503.

²³Al-Sarakhsi : op. cit., vol. xxx, pp. 50-54; Tahir b. Muhammad : *Khulsatul Fatāwa*, Delhi, pp. 420-21.

²⁴Ibn Hazm : op. cit., vol. vi, p. 376.

²⁵Al-Hilli : op. cit., vol. ii, p. 197.

pregnancy is that of the wife of the deceased the least period of the delivery of the pregnancy has been fixed to be 365 days after the death of or separation from the deceased, whereas the least period of the delivery of pregnancy of the wife of other than the deceased, in the event of her being a widow, 365 days and, in the event of her being a wife, 270 days after the death of the ancestor have been fixed. Similar law, with some minor changes, is in force in Syria, (Sections 299-301), Tunisia (Sections 147-150) and Morocco (Sections 288) as well, whereunder the longest period of pregnancy has been fixed as one year. (Also see Vol. I, pp. 696-97, 707-8 of this Code.)

Section 314. The 'untraceable' is, in the *Shari'ah*, that person Inheritance by and from an untraceable person about whom there is no information as to his being dead or alive. His share in the estate, like that of a child in womb, shall be kept in reserve.

2. If the untraceable heir bars totally the share of the other heirs present, the entire estate of the deceased shall be withheld from division. If he is not the cause of total bar, then each heir shall be given his due share after the proportionate deduction for the share of the untraceable the total deduction being equal to the share of the untraceable heir.

3. If the untraceable is proved to be alive his share, kept in reserve, shall be made over to him on his coming back.

4. When it is declared that the one untraceable is not alive, his share shall be divided among his heirs present at the time of such decision. In such a case, the heirs of the untraceable who died before his being so declared shall not inherit from him.

COMMENTARY

The term 'untraceable' shall apply to such missing person regarding whom, inspite of search, no trace is found whether he is alive or dead.²⁶ Imam Sarakhshi writes that the position of an untraceable person is like that of a child who is still in the womb of its mother and for whom there is the uncertainty whether it is alive or dead.²⁷

²⁶Al-Jurjani : op. cit., p. 173.

²⁷Al-Sarakhshi : op. cit., vol. xxx, p. 55.

The legal position regarding estate of the untraceable person is that so far as his own property is concerned he is considered to be alive; but as regards the property of others he is considered to be dead. That is to say, the property of the untraceable shall not be divided as long as his being alive or dead is not known with certainty. If some praepositus of the untraceable person dies his share from the property of the said deceased shall be kept in reserve in the same way as the share of a child in womb. This is because the untraceable person's being alive, so long as he is traceable, is in a certain degree of knowledge. And the general rule is that what is in the degree of knowledge will be accepted as such in the same degree of knowledge based on the rule of *istishāb al-hāl*. This rule regarding the life of an untraceable person is in accordance with the maxim of "أقراء ما كان على ما كان" i. e. whatever is in whatever state (in observation, perception) shall be taken to continue in the state as before (unless otherwise proved). As the person at the time of becoming untraceable was existing he shall be taken to be alive as such. This rule of "consistency or continuance as before" is accepted as an argument for protection against injury, but it cannot be accepted as an argument for positively proving a fact which did not exist before. Hence, under the rule of *Istishāb*, the untraceable person shall be considered to be alive regarding his own property as a beneficial presumption. However, regarding other's property he shall not be considered to be alive. The rule of *istishāb* as a beneficial presumption cannot be put forth as the argument of one's entitlement but it can well be an argument for avoiding injury to him. As the untraceable person being dead or alive is a matter in suspense, his share in the property of others, shall, therefore, be kept in reserve. For instance a person dies leaving behind him two daughters and an untraceable son. The assets left by him are in possession of the two daughters. Besides his own daughters, there are present two daughters and one son of the untraceable son too. All these persons also acknowledge the untraceability of the son of the deceased. Then all of them institute legal proceeding in a court of law claiming their shares in the estate left by the deceased. It shall be proper for the court to let half of the estate of the deceased go to the daughters as their own property. The remaining half of it being treated as the property of the untraceable son of the deceased shall be kept in reserve. If the untraceable person is proved to be alive this half shall be made over to him. If he, in fact or under a decree, is held to be dead, taking out one-sixth from the remaining one half shall be made over to the two daughters to complete their two-thirds share and the remaining

one-third shall be divided among the two daughters and one son of the untraceable person on the principle of twice of female to a male.²⁸

Hanafis' rule : There is a difference of opinion among the jurists as to the time when the untraceable shall be declared as dead. The plain rule of the Hanafis regarding the presumption of the time of an untraceable person's death is that he shall be taken to have died when none of the men of his age (contemporaries) is alive. Another view is that he shall be declared as dead on the passing of hundred and twenty years from the time of his untraceability and the other is of hundred years. But the correct and well-known narrative is that he shall be assumed to have died when his contemporaries are no more. Thus, whenever the correct and true knowledge of the death of the untraceable is obtained or the court declares him to be dead, his share of the property in reserve shall be divided among his heirs who exist at the time of the ascertainment or the passing of the order regarding his death. In such cases, those of the heirs who are dead prior to the obtaining of the correct and true knowledge, or the passing of the order of the Court, shall have no concern with his property, because in the matters of inheritance the condition is that the heirs must exist on the death of the ancestor. Hence, the heirs who are alive, when the sure knowledge of the death of the untraceable is obtained, or when an order regarding his death is passed, shall be entitled to the estate.²⁹ (It will be interesting to note that under the old English law, the presumption of death, like that of the Hanafis, was of hundred years).

Mālikī, Shafī'i and Hanbali Rules: Imams Mālik and Shafī'i hold that the property of the untraceable shall not be divided as long as his actual or decreed death is not proved. According to Imam Ahmad Ibn Hanbal, in the circumstance wherein there is a strong presumption of the death of the untraceable, for example he is in the group of those whose death, as a whole, has taken place, or he is sailing on a ship that is drowned, or he has gone away into jungles or forests where people generally meet their death etc. etc. then, after waiting for such untraceable for four years (from the time of his untraceability) his property shall be divided between his heirs.³⁰ In cases where a

²⁸Al-Atasi, Khalid : *Sharh Al-Majallah*, Hims, 1349 A.H., 1930 A.D., vol. i, p. 21.

²⁹Al-Sarakhsi : op. cit., vol. xxx, pp. 54-55; Al-Jurjani : op. cit., pp. 137-38; Tahir b. Muhammad : *Khulsatul Fatāwa*, Delhi, vol. ii, p. 420.

³⁰Ibn al-Qudamah al-Maqdisi : op. cit., vol. vii, p. 205.

person becomes untraceable in such circumstances wherein the presumption of his death is not so strong, Imam Ahmad Ibn Hanbal is reported to have made several observations:—

1. That his property should not be divided till his death is not proved similar to the rule propounded by other Imams.
2. That the distribution shall be postponed for the period of ninety years.
3. That the fixation of (the time of) death shall rest on the discretion of the Ruler.³¹

Shi'ah Imamiyah's Rule : The rule of conduct of the Shi'ah Imamiyah also appears to be that the untraceable person shall be and remain the owner of his property as long as the knowledge of his death with certainty is not obtained.³²

*Zahiri Rule :—*The Zahiris agree with those of the Hanafis, Malikis and the Shafi'is³³.

Modern Legislation :

Under Section 45 of the Egyptian Law of Al-Mawarith No. 77 of 1943, it has been provided that the share of an untraceable person in his ancestor's property shall be withheld for him. When he presents himself alive he shall take his share. If the order declaring him dead is passed, his share shall be divided among those heirs who are alive at the time of the order passed regarding his death. If he returns after the order declaring his death has been passed, he shall be entitled to take back the share remaining (in hand) with the heirs. Same is the law in force in Syria (Section 302). Under the Tunisian Law it has been provided that about a person who becomes untraceable during a war or in exceptional circumstances there shall be a strong presumption that he is dead. If the court fixes a period (for his return) the period shall not exceed two years. Thereafter, the court shall hold him to be untraceable (as dead). If a persons, in other

³¹Abu al-Barkat (d. 652 A.H.) : *Al-Muharrar fil fiqh*, Cairo, 1950 A.D., vol. i, p. 406; Ibn al-Qudamah al-Maqdisi : op. cit., vol. vii, pp. 205-6; Al-Abi : op. cit., vol. ii, p. 339.

³²Jafar b. Muhammad b. al-Hasan al-Tusi (d. 460 A.H.) : *Al-Istibṣār*, Najaf, vol. iv, p. 197.

³³Ibn Hazm : op. cit., vol. vii, p. 164.

than these circumstances, becomes untraceable, the question of his death shall be left to the discretion of the Court; which, taking all possible measures by publicity etc., shall make enquiries and come to a decision whether the untraceable is alive or dead (Chapter 81). In the Moroccan Law (Section 220) the untraceable shall be considered to be alive so far as his property was concerned. His property, therefore, shall not be divided among his heirs as long as the Court does not pass an order regarding his death. The untraceable to become heir in respect of other's property shall be considered to be dead, hence he shall not be the heir to any other (ancestors). His share shall be kept in reserve till the ascertainment of the fact whether he is alive or death.

Indo-Pakistan Law :

In Pakistan, in connection with the annulment of marriage contract the period of four years has been fixed (See Vol. I, pp. 617-38 of this Code.) But in case of inheritance no specific period is fixed. However, under the Evidence Act, 1872, seven years' period is provided for presumption of death if his whereabouts remain unknown during this period. But the difference between the annulment of a marriage contract and the division of estate as such shall have to be kept in view, because the underlying social currents generally running through both these matters are different. However, it must be the responsibility of the government to employ all the ways and means in search of its untraceable citizens.

Prof. Coulson, on the law of inheritance from or by an untraceable person as in force in the Middle East and Indo-Pakistan sub-continent writes: In the light of modern systems of communication and methods of search and enquiry, the Hanafi rule that a person could not be judicially pronounced dead until he had passed the recognised life-span of ninety years was felt to be impractical and occasions unnecessary hardship.

In India and Pakistan the rule has been superseded by Indian Evidence Act, 1872, under the terms of which a judicial decree of death may be issued when, despite proper search and enquiry, a person has been missing without trace for a period of seven years.

As always, a greater concern was shown in the Middle East to effect reform on the basis of acceptable Islamic authorities, and the Egyptian Law No. 25 of 1929 in effect adopted Hanabli Law in this regard. Where a person disappears in circumstances which raise a presumption of his death

and due enquiries concerning him prove fruitless, a judicial decree of death may be issued when four years have elapsed since the date of disappearance. In all other cases the court may, at its absolute discretion, pronounce a decree of death when it is satisfied, taking into account the particular circumstances of the case and the results of enquiries, that the missing person can no longer be alive.

The adoption of these provisions, almost verbatim, by the Jordanian Law of Family Rights, 1951, is noteworthy, inasmuch as it constitutes the solitary instance of change in the traditional law of succession introduced by Jordan.

Adopting the same general approach, the Tunisian Law of Personal Status of 1956 declares that, where a person disappears during a battle or in other circumstances which make his death probable, the court shall fix a period not exceeding two years for the purpose of search and enquiry, after which, if no information is forthcoming, it may proceed to issue a decree of death. Other cases, as in Egypt, are matter for the absolute discretion of the court.

The Shi'i law embodied in the Civil Code of Iran appears as something of an amalgam of traditional authorities. A person may be judicially declared dead: (a) when he has been missing without trace for ten years and would at the end of this period have reached the age of seventy-five or (b) when he has been missing for three years where the circumstances of disappearance arise a presumption of death." (Succession in the Muslim Family, Cambridge, 1971, p. 210).

Section 315. (1) The Law regarding inheritance by a Muslim who is the prisoner of an unbeliever (Non-Muslim State) is the same as that the inheritance of Muslims in general. His share in the estate shall be kept reserved till he returns.

(2) If he does not return alive, his reserved share shall belong to his heirs.

(3) If he turns an apostate, the law of apostasy shall be applicable to his property.

COMMENTARY

There is some difference of opinion among the jurists with regard to the estate of a Muslim in captivity of a non-Muslim State.

Hanafi View : According to the Hanafis the law regarding the inheritance of a Muslim prisoner who is in the captivity of an unbeliever (Non-Muslim State) so long as he has not abandoned his faith, is the same as is the law regarding the inheritance of Muslims in general. If he forsakes the religion of Islam, the law regarding his estate is the same as that regarding the property of an apostate. If there is no information regarding his turning an apostate or his being alive or dead, he shall be legally regarded as untraceable.³⁴

Maliki Rule : According to Imam Malik, in all circumstances till the prisoner's death or his turning an apostate is ascertained, the distribution of his property shall be kept in abeyance.³⁵

Shafi'i Rule : According to Imam Shafi'i, the rule regarding the inheritance of a prisoner and the untraceable is the same.³⁶

Hanbali View : Imam Ahmad Bin Hanbal agrees with the Hanafis in their view that a Muslim prisoner shall be the heir like other heirs.³⁷

Section 316. The illegitimate and imprecatory children shall be the heir of their mothers and of her relatives, and the mother shall be their and their relatives' heir. The father or his relatives shall have no concern with such children's inheritance or their property.

COMMENTARY

The one who is born of a man and woman without marital relationship between them is called illegitimate. Whereas the one that comes into being from man's own wife after she has been impregnated on man's accusation of adultery and denial of the same by her, is called the imprecatory child. According to Imam Shafi'i by imprecation itself, and according to the Hanafis

³⁴Al-Jurjani : op. cit., p. 142.

³⁵Imam Sahnun (d. 240 A.H.): *Al-Mudawwatul Kubra*, Cairo, 1323 A.H. vol. viii, p. 138.

³⁶Al-Firozabadi : op. cit., vol. ii, p. 26.

³⁷Ibn Qudamah al-Maqdisi : op. cit., vol. vii, p. 131.

because of Qaḍi's effecting separation on imprecation between them, the lineage of the child snaps from the father and is accepted with the mother alone. The child of the imprecated woman is, as if, without father. Same is the case of illegitimate child. Hence the 'Asbah of imprecatory and illegitimate children are also the relatives of the mother. Both of them get inheritance from their mothers and her relatives. On this basis, the imprecatory and illegitimate children's father or father's relatives cannot claim anything from such children's estate³⁸ and *vice versa*.

Difference between illegitimate and imprecatory children :

Under the law, the difference that exists between the illegitimate and imprecatory children is that the father of an illegitimate child, from whose seed he is born, shall not be considered under law his father, inspite of his claim of paternity. But if the father of the imprecatory child claims paternity, the lineage shall legally stand proved and the inheritance between them shall get established.

There is another distinction between the illegitimate and imprecatory children. If the illegitimates are born twins, the one gets inheritance from his twin as of an uterine (Akhyāfi) brother. That is to say, he gets one-sixth from his twin. If the imprecatory children are born twins the one gets from his twin as of a full brother.³⁹

The rationale of this distinction is that legally there is no father of the illegitimate child. His twin (either the brother or sister), therefore, shall be related through the mother only. Whereas in case of imprecatory child the accusation of adultery will not affect secular affairs. The world hereafter is the place where imprecation shall be judged (i.e. God shall give His decision on the day of judgement). Hence the twin of the imprecatory child (brother or sister) is from the same father, though the lineage from the later stands repudiated.⁴⁰

Hanbali Law :

Prof. Coulson in his book, "Succession in the Muslim Family", writes: "Although there are no mutual rights of inheritance between a father and

³⁸Abu'l Laith Samarqandi : *Khazānatul Fiqh*, Baghdad, vol. i, p. 412; Al-Maqdisi op. cit., vol. vii, pp. 121-25.

³⁹Abdullah b. Mahmud b. Mawdud : op. cit., vol. v, p. 94; *Fatāwa Alamgiri*, Dewband, vol. iv, p. 405.

⁴⁰Ibn Nujaym : op. cit., vol. iv, p. 119; Al-Kasani ; op. cit., vol. ii, p. 248.

his illegitimate child, illegitimacy is not, technically, an impediment to inheritance in the same way as homicide or difference of religion. The blood relationship, or *nasab*, which grounds a right of inheritance, must be a legal relationship; and since there is no legal tie of *nasab* between a father and his illegitimate child or between their respective "legal" relatives, the root cause of inheritance simply does not exist. Just as the partners in an invalid marriage are not "husband" and "wife", so a person and his illegitimate offsprings are not "father" and "child" for the purpose of inheritance." (P. 172).

As regards inheritance by illegitimate person, he writes: "Under Shi'i law the illegitimate child has no legal relationship with either its father or its mother. No mutual rights of inheritance therefore exist between an illegitimate person and his or her parents, nor between the issue of the illegitimate person and the blood relatives of either the father or the mother.

Sunni law, on the other hand, while accepting that there is no ground for inheritance between an illegitimate person and his or her father, or between their respective blood relatives, does recognise the existence of a legal relationship between an illegitimate child and its mother for all purposes. An illegitimate person may therefore inherit from his mother, from her children, legitimate or illegitimate, as a uterine and, in appropriate circumstances, from her other relatives as a member of the outer family". (*Ibid*, P. 173).

As regard 'inheritance from illegitimate persons', Prof. Coulson further writes: "Where the *praepositus* in an illegitimate person there is a divergence of view in Sunni law as regards the rights of inheritance of the maternal relatives. According to the majority—the Maliki, Hanafi, and Shafi'i schools—the mother and her relatives inherit upon normal principles. Subject to the rules of total or partial exclusion the mother herself, her own mother and her children (the uterine brothers or sisters of the *praepositus*) will succeed as Qur'anic heirs, while her other relatives will inherit only as members of the *praepositus*' outer family. Thus, an illegitimate person who is not survived by his own son or son's son will have no agnatic residuary heirs. Hanbali law, on the other hand, holds that the male agnate relatives of the mother are to be considered, for purposes of succession, as the male agnate relatives of her illegitimate child, on the ground that these relatives shoulder the burden of responsibility for the tortious actions of the illegitimate child which entail the payment of compensation and are therefore entitled, in return, to rights of succession. The mother's male agnate relatives will, of course, be excluded by any true male agnate of the illegitimate

praepositus himself--i.e. a son or son's son howsoever low—but will otherwise succeed as his residuary heirs .. A variant Hanbali view, though of weak authority, is that the mother herself is a residuary heir of her illegitimate child, and as such excludes from succession all her own male relatives.”⁴¹

Illegitimate in Shi'ah Fiqh :

According to Shi'ah *fiqh* the illegitimate child has absolutely no right in the inheritance. He can not be the heir even of his mother and her relatives, nor can any one among the former be his heir.⁴²

Modern Legislation :

Under “Qanun Al-Mawarithh No. 77 of 1943 of Egypt the illegitimate and imprecatory children shall be the heirs of their mothers and their relatives. The mothers and their relatives too shall be their heirs (Section 47). Same is the law in Syria (Section 303) and Tunisia (Chapter 152) and of Morocco as well.

Indo-Pakistan Courts' Rulings :

The decision of the Indian courts appear somewhat inconsistent in the matter of inheritance by illegitimate children. In the Calcutta case *Bafatun v. Bilaiti Khanum* (1903), (30 Cal. 683), an illegitimate person inherited half the estate of his mother's sister, a Hanafi woman whose only other surviving relative was her husband. To its contrary in the Allahabad case of *Rahmatullah v. Maqsood Ahmad* (1950 I. L. R. All. 713), an illegitimate was not regarded, for purposes of inheritance, as the uterine brother of his mother's legitimate son.

Section 317. (1) The eunuch (sexless and castrated), if a male (characteristics predominant) shall get a male's share; if a female, she shall get a female's share in the inheritance.

(2) If it is difficult to decide whether the eunuch is, with characteristics predominantly, a male or a female, it shall be held to be of the sex in which it inherits the smaller share of the estate.

⁴¹N. J. Coulson : Succession in the Muslim Family, Cambridge, 1971, p. 174.

⁴²Al-Hilli : op. cit., vol. ii, p. 195.

COMMENTARY

Literal meaning of the word “Khuntha” “خنثى” is soft and twisted. Technically that person is called “Khuntha” (*mukhannath*) who from birth possesses both the male and female characteristics or possesses none of them⁴³. The Doctors of *fiqh* are unanimous as to the first case. Indeed, in the second case such a person, according to Shi‘ah jurists, is not a Khuntha, rather he is called “*qur‘a*”. In case of possessing both the characteristics, if urine is passed through the male organ the person concerning inheritance and other legal matters, shall be considered to be a male. If urine is passed through the female organ she shall be considered to be a female.

Qadri Pasha has stated in *Al-Ahkam al-Shari‘yah fi‘l Ahwāl al-Shakhsyah* (Section 633) “that the person called “*Khuntha*” is one who possesses both the male and female organs or none of them. In the first case if he passes urine through the male organ, he shall be a man. If through the female organ, she shall be a female. If it passes through both the organs, the organ through which it passes first shall govern the sex relating to it. If there is equality in these characteristics too it shall be called *Khuntha Mushkil*, about whom no decision could be made whether it is a male or a female. These details relate to the condition prior to the attaining of puberty. After attaining puberty if the person grows beard or co-habits with a woman or gets night pollution, it shall be a male. If it grows breasts or milk starts to flow or it starts having monthly courses or becomes pregnant or it can be cohabited with as a woman, it shall be a female. If, of the afore-stated characteristics, there be no sign or there be conflict in determining the sex, then it shall be held to be *Khuntha Mushkil* (Sex undertermined) and for it there shall be a smaller part of the estate. For instance, a father dies leaving a son and a ‘*Khuntha*’. The son shall get twice the share of the *Khuntha*. The *Khuntha* shall get the lesser (i.e. a daughter’s) share, in as much as the share of a daughter is less than that of a son.

Ibn ‘Addi has reported from Ibn Abbas, in ‘*Kāmil*’ that it was enquired from the Prophet regarding the inheritance of a ‘*Khuntha*’. He said, “The organ from which it passes the urine that shall be relied upon”. Abdul Razzaq as well has, in his book “*Al-Muṣannaf*”, reported from Haḍrat Ali thus, “If it passes the urine from both the organs, the one from which it passes first, that organ shall be relied upon”. This is the unanimous view.

“للخنثى المشكل، وهو الذى لا يعرف اذكر هوام انثى، اقل النصيبين” 43

If it is difficult to decide whether the '*Khuntha*' is a male or a female, in that case it shall be considered to be entitled to a lesser share. If by holding it to be a male it gets the lesser share, it shall be held to be a male. If by holding it to be a female it gets the lesser share, it shall be held to be a female. This is the rule of practice of Imam Abu Hanifah. According to S̤hibain as well this criterion is valid. The reports from most of the Companions of the Prophet as well agree that for a '*Khuntha Mushkil*' whatever is less, the same is its lot. However, Imam Sha'bi holds that the average of the shares of the male and the female be allotted to a '*Khuntha Mushkil*' but the '*Fatwa*' (final verdict) is in favour of Imam Abn Hanifah's ruling."

Modern Legislation :

'*Khuntha Mushkil*' as defined under Section 46 of the Egyptian Law of "Al-Mawārith" 1943 is the one about whom it is not known whether it is male or female; to him a male's or a female's share, whichever is less shall be given.

CHAPTER XXXVIII

Impediments to Inheritance

Section 318. By "Impediments to Inheritance" are meant such causes that bar the receiving of inheritance by an heir.

Section 319. Impediments to inheritance are as under:—
Kinds of impediments

- (a) i. Homicide.
- ii. Difference of religion.
- (b) i. Apostasy.
- ii. Simultaneous death of ancestor and heir.

COMMENTARY

In the classical books of *fiqh*, there are mentioned four impediments to inheritance as under :—

1. Slavery.
2. Homicide.
3. Difference of religion.
4. Difference of Dār (Domicile).

Some of these books also mention two other impediments as well. They are :—

1. Apostasy.
2. Simultaneous death of ancestor and heir.

The majority of jurists have generally stated in their works the first four impediments only. The other two impediments have not been mentioned by them specifically as impediments to inheritance, because in both of these impediments the deprivation occurs due to the absence of a necessary condition

to a specific cause, not based on the ground of the real impediment.¹ Since these causes, too, result in deprivation amounting to an impediment to inheritance, they have also been included in this chapter.

As the 'Institution of slavery' does no more exist, the impediment of 'slavery' has not been included in the kinds of impediments. Similarly the impediment due to difference of *Dār* (domicile) has also not been listed in the Section codified hereinabove as the difference of *Dār* is not an impediment to inheritance for and among the Muslims. A Muslim domiciled in any Muslim country can inherit and be inherited from, irrespective of domicile or residence in any Muslim country (*Dār al-Islām*).¹

Section 320. If an heir is found guilty of homicide of his ancestor, he shall not inherit from that ancestor.

Exception.—If the homicide is committed in the defence of one's own life and property, not exceeding the limits prescribed by *Shari'ah*, the killer shall not be deprived of inheritance.

(ii) If the killer is a child of less than ten solar years of his age, or an insane he shall not be deprived of the inheritance.

COMMENTARY

Under the Islamic Law, homicide, as regards its legal effect, is of two kinds :—

(a) The homicide that necessitates *Qisās* (blood for blood) or *Diyat* (blood money) or *Kaffārah* (penalty).

(b) The homicide that does not necessitate *Qisās* (blood for blood), or *diyat* (blood money) or *Kaffārah* (penalty).

(a) The homicide that necessitates *Qisās* (blood for blood), *diyat* (blood money) or *Kaffarah* (penalty) is of three kinds :—

¹ Al-Haskafi (d. 1088 A.D.): *Durr al-Muntaqā*, o.m.o. *Majma' al-Anhur*, Cairo, 1328 A.H., vol. ii, p. 749.

^{1a} *Al-Sharifiyyah*, p. 16; *Al-Mughni*, vol. vii, pp. 168-69; Also see Yousuf Abbas vs. Ismat Mustafa; PLD 1968, Karachi 480.

1. Intentional homicide (*Qatl 'Amad*).
2. *Quasi* intentional homicide (*Qatl Shibh 'Amad*).
3. Homicide under mistake (*Qatl khatā*).

The second and third categories have been classed as culpable homicide (or manslaughter) not amounting to murder in the British law. For them in Indo-Pakistan the term 'culpable homicide not amounting to murder' is in use. (See Section 299 of the Penal Code, 1860).

(b) The homicide that does not necessitate *Qasās* (blood for blood) *diyat* (blood money) or *kaffarah* (penalty) is of two kinds:—

1. Homicide by inadvertance amounting to mistake (*Qatl Qā'im Muqam khata*).
2. Indirect homicide (*Qatl bil Tasabbub*).

Intentional homicide (*Qatl 'Amad*) :

Intentional homicide is that which is committed with the intention of killing a person. That is to say, a person attacks the other person with a weapon having the intention of killing and actually kills him.

Imam Abu Hanifah's View : According to Imam Abu Hanifah intentional homicide is that which is committed with the intention of killing by a weapon or similar instrument that can separate limb from limb. That is, the weapon or instrument must be capable of cutting any limb into pieces, for example pointed stone, a sharp piece of wood or any other like material. The use of such a weapon proves that the intention was unmistakably of killing the person.²

Sāhibain's View : According to Sāhibain (Imams Abu Yusuf and Muhammad al-Shaybāni) there is no condition allocated as to the kind of weapon used for the commission of homicide. Rather, the material or object used in homicide should be such that the probable result of its use would be death. They say that death may be caused deliberately by a weapon as well as by other means, in consequence of which death commonly occurs. That is why, they hold it as deliberate homicide if the death is caused by drowning, throttling, pushing one down from a high place such as roof etc. as well as

²Al-Kasani : op. cit., vol. vii, p. 233; Al-Zail'ī : *Tabyīn al-Haqā'iq*, Cairo, 1315 A.H., vol. vi, p. 97.

serving one with poison that causes death and the person concerned knows it to be deadly.³

Imam Taḥāwī's View : The point of view of Imam Taḥāwī as well is in agreement with that of Sāhibain.⁴

Mālikī View : According to the Mālikis, causing death by intentionally striking with an object that (commonly) causes death of a human being is called deliberate homicide.⁵ Abu Zahra, in his book, *Aḥkām al-Tarkāt wal Mawarith* (p. 126), has, however, stated the creed of Imam Malik thus : "According to Imam Mālik the homicide that impedes inheritance is that which is committed intentionally, whatever its method may be, by a person who is not exempted from religious obligation, without any excuse."

Shafi'i view : Imam Shafi'i maintains that if the person intentionally commits homicide with a sharp weapon made of iron or of material that cuts the flesh in the same manner, or any material that causes death by its weight, as stone and wood, or a material about which it is probable that its use shall cause death, all deaths so caused shall be considered to be deliberate homicides and Qiṣāṣ (blood for blood) shall become due.⁶

Hanbali View : According to Imam Ahmad Bin Hanbal, intentional homicide of a human being, knowing him to be a human being, with a material that in all probability is the means of causing death is called intentional homicide. In the Book, *al-Iqnā' af Hanbali fiqh*, several kinds of homicides depending on the nature of weapons causing death are fully described.⁷

Shi'ah View : According to Shi'ah Imamiyah there are only two kinds of homicides: Intentional homicide and homicide under mistake. According to them, intentionally killing of an innocent person by a prudent and adult person, without distinction of instrument, with a weapon or instrument from which death usually occurs, is called 'intentional homicide'. Thus causing death by slaughtering, throttling, poisoning by means of a sword or dagger or by heavy object, stoning that crushes, or giving poisonous injection, all

³Al-Kasani : op. cit., vol. vii, p. 234.

⁴Al-Tahawi : *Al-Mukhtaṣar*, Deccan, 1370 A.H., p. 232.

⁵Al-Zarqani, Muhammad b. Abdul Baqi b. Yusuf (d. 1122 A.H.), Cairo, 1382 A.H., 1962 A.D., vol. v, p. 173.

⁶Al-Shafi'i : *Al-Umm*, vol. vi, p. 5.

⁷Sharafuddin Al-Maqdisi (d. 868 A.H.): *Al-Iqnā'*, Cairo, vol. iv, p. 163.

these are included in the homicide. According to an authentic version, if intentional homicide is committed with an object from which occurrence of death is exceptional, yet death does occur, it shall also be included in the 'intentional homicide'.

Zāhīrī View : According to Zāhiris like the Shi'ahs, there are principally only two kinds of homicide: intentional homicide and homicide under mistake. According to them, it is also intentional homicide where a person intentionally kills another person with an object from which sometimes death occurs and sometimes it does not, provided the killer is prudent, adult and 'subject to religious obligations' (*Mukallaf*). The Zahiris, however, hold that there is another sort of homicide which is neither intentional nor is one under mistake. For instance, where homicide is committed by an object from which a man never dies. In such an eventuality, according to them, there is neither the *Qisās* (blood for blood) nor 'blood money' nor any penalty (*kaffarah*) whatsoever. It only entails some *tāḍīb*, admonition or some other disciplinary measure.⁸

Intention as ingredient : Regarding intention as an ingredient of homicide, inference of general intention is enough. It is not necessary that there should be deliberation and firm determination from before.⁹ In the intentional homicide, *Qisās* (blood for blood) is obligatory as is mentioned in the Prophet's tradition, "الْعَدْلُ قَوْدٌ" i.e. the intentional homicide essentially entails 'blood for blood'.¹⁰ However, there is an exception to this rule. If the father intentionally kills his son the maxim of 'blood for blood', because of father's respect, shall not apply, but the father shall stand deprived of his son's inheritance because of killing his son unjustifiably.

Punishment : In the light of the several points of views, it can be easily concluded that the important condition of the homicide punishable with *Qisās* is that the person must have committed homicide intentionally. There should be no uncertainty in his mind about the intention of his committing homicide and that the blood of the person so killed is on no account lawful to the killer. The killer shall be liable to *Qisās* unless otherwise agreed to by the heirs of the deceased in which case *diyat mughallizah* (heavy blood

⁸Ibn Hazm : *Al-Muhalla*, op. cit., vol. vii, p. 417.

⁹Subhi al-Mahmasani : *Al-Nazriyatul 'Amanat wal 'uqūd fil Shari'at al-Islamiyyah*, Beirut, pp. 140-44.

¹⁰Al-Jassas (d. 370 A.H.) : *Aḥkām al-Qur'ān*, Cairo, vol. i, pp. 134-35.

money) shall be due against the killer or his family 'Aqilah (relatives descended from one common father).

Quasi intentional homicide (Qatl Shibh 'Amad) :

The Hanafis classify homicide into intentional and Quasi intentional, whereas some other schools of law do not make any such distinction.

Hanafis : According to the Hanafis, a 'Quasi intentional homicide' is that which is committed with the intention of killing but with such a weapon or object that is not capable of tearing and cutting into pieces parts of the human body e. g. a small piece of wood. Imam Abu Hanifah in this respect says that the homicide which is committed by any other object except an iron weapon e. g. club, or by fire or from other similar object is *Quasi* intentional homicide. According to him the homicide that is committed with weapon that does not cut or pierce through the body is *Quasi* homicide, though the weapon be such from the use of which death occurs generally. Imam Abu Yusuf and Imam Muhammad hold that *Quasi* intentional homicide is that which is caused by an object by which generally death does not occur. In other words, according to the Sāhibain, whenever such a means of homicide is used from which generally death does not occur, but in the event it does occur, it shall be called '*Quasi* intentional homicide'.

Other Views : Imam Shafi'i holds that homicide is the result wherein the striking is intentional whether or not death was intended. That is to say, the person intentionally hits a human being but has no intention of killing him, yet in the event death occurs even without such intention. Whereas according to him the intentional homicide is that wherein the 'act' and the result of the act (the death) are both intentional. Imam Ibn Hanbal also appears to be in agreement with Imam Shafi'i. According to Shi'ah Imamiyah as well as the Zāhiriyah, there is no distinction between intentional homicide and *Quasi* intentional homicide. It is only the intention which distinguishes one with the other kind of homicide i.e. by mistake.

Punishment : In *Quasi* intentional homicide, blood money and penalty (*kaffarah*) shall necessarily follow. The maxim of 'blood for blood' does not apply to a case of *Quasi* intentional homicide.¹¹

¹¹Al-Kasani : op. cit., vol. vii, p. 251; Abu'l Laith Samarqandi (d. 383 A.H.) : *Khazānatul Fiqh*, Baghdad 1965, vol. i, pp. 354-55; Damad Afandi : op. cit., vol. ii, p. 617; *Bahr al-Rā'iq*, (*Takmilah*), Cairo, 1334 A.H., vol. viii, p. 291.

Homicide under mistake (*Qatl khata*) :

Homicide under mistake, according to Hanafis, is one that occurs during a valid action by mistake without any intention or deliberation. For instance, an arrow is shot towards a game animal by the hunter but strikes a man and he is killed; or when a person is driving a car and it collides with a man and he is killed by that accidental collision.

Shafi'i view: According to Imām Shafi'i as well, homicide by mistake is that wherein there is no intention of either the act or the consequence thereof that follows.

Zahiri's View: Imam Ibn Hazm holds the view that 'homicide by mistake' as opposed to intentional is that wherein there is no intention of killing anyone.¹²

Punishment: In case of 'homicide by mistake' blood money and penalty (*kaffarah*) ensue as punishments.¹³

Homicide committed by inadvertence (*Qatl Qā'im Muqām khata*) :

In case of homicide by mistake the person committing it takes some step towards doing an act other than of killing any one but commits a mistake in that act resulting in death of another person. But where the person committing homicide has no intention of doing any act at all and death occurs without any attempt or intention on his part whatsoever, it shall, according to Hanafis, be held to be have been committed by inadvertence amounting to mistake. (*Qā'im Muqām khaṭā*). In other words, death caused by an act, neither intended nor likely in the ordinary course of nature to cause death shall be deemed to be a homicide committed inadvertently. For instance, a person tossing about while sleeping on the upper berth of a compartment falls down on somebody lying below and the latter dies of injury so sustained. The resulting death will, however, be covered by the same law as death caused by mistake (of fact or law).¹⁴

Indirect homicide (*qatl bil Tasabbub*)

Indirect homicide (*qatl bil Tasabbub*) is that kind of homicide which is not the direct cause of an act by the offender. The difference between homicide by mistake' and 'indirect homicide' is that a homicide by mistake is the direct result of an act of the killer himself. On the other hand,

¹²Ibn Hazm : op. cit., vol. vii, p. 417.

¹³See footnote 11 *supra*; *Takmilah (ibid)*, p. 287.

¹⁴*Ibid*.

'indirect homicide, occurs without there being any act or an intention thereof leading to death of that person, but death occurs because of a cause remotely and indirectly assigned to the person inspite of the fact that he has no connection with the ensuing death either in action or intention or both.

According to the Hanafis indirect homicide is a distinct kind from 'homicide by mistake' whereas the Shafi'is and Hanbalis hold an 'indirect homicide' also to be a kind of 'homicide by mistake'. The Zahiris also assume such indirect homicide to be the homicide by mistake. According to the Shi'ahs, however, indirect homicide is of four degrees as detailed in *Shra'i al-Islam*.¹⁵

In 'indirect homicide' the offender himself does not take part in the act of homicide but his act (as an initiative) becomes the cause of homicide. That is to say, the homicide is not committed by him personally but the act initiated by him though by itself not related to death at all, results in another person's death. In other words, the distinction between 'homicide by mistake' and 'indirect homicide' is that causing death in 'homicide by mistake' is the direct result of the act of the offender whereas 'indirect homicide' occurs from a cause remotely and indirectly assigned to him. For instance, a person gets a well dug up or places a stone on the path. Another person by negligence falling into the well dies or stumbling over the stone falls and dies. His death so caused will be called 'indirect homicide'.¹⁶ Another instance of indirect homicide is that witnesses give evidence against a person that he has committed homicide. On the basis of their evidence he is convicted of homicide. After the execution of the death sentence the witnesses resile from their statement and confess that since they wanted the person to be sentenced to death, they wilfully gave false evidence against him. Or a judge knows that the accused is innocent but he intentionally passes death sentence against him and after the death sentence is executed he admits that he had deliberately sentenced him to death *mala fide*. In both these cases causing death is the result of initiatives of the offenders and therefore indirect homicide.¹⁷

Punishment : According to the Hanafi jurists in 'indirect homicide' only the *diyat* (blood money) is obligatory on the offender. In case of retracting of evidence by the witnesses the *diyat* is payable by the witnesses.¹⁸

¹⁵Al-Hilli : op. cit., vol. ii, pp. 265-66 (*Kitāb al-Qiṣāṣ*).

¹⁶Ibn Abīdīn : op. cit., vol. v, p. 54.

¹⁷Damad Afandi : op. cit., vol. ii, p. 618.

¹⁸Ibn Nujaym : *Baḥr al-Rā'iq*, Cairo, 1328 A.H., vol. vii, p. 137.

But, according to Imam Mâlik, Imam Shāfi'i and Imam Ahmad b. Hanbal, the law that applies to 'homicide by mistake' shall also apply to indirect homicide.¹⁹

Effect of homicide on Inheritance :

According to the Hanafis the person who commits homicide without justification gets disinherited from any property of the person killed whether the offence is committed intentionally or is committed by mistake.²⁰ That is, in all the four cases : (i) intentional homicide (ii) *Quasi* intentional homicide (iii) the homicide by mistake, and (iv) indirect homicide amounting to mistake the offender gets deprived of the estate left by the person so killed. Of course, in case of indirect homicide he is not so deprived.

The Sunni and the Shi'ah Imams are agreed on the offender being deprived of inheritance from the person so killed in consequence of intentional homicide (or *Quasi* intentional homicide). But they differ in the effect and consequence of homicide by mistake so far as it concerns the question of inheritance from the person killed.

Hanafi View : The Hanafis, in the event of 'homicide by mistake', as already stated, hold the offender to be deprived of the inheritance from the person killed.

Mâliki View : Imam Mâlik, on this question, differs from the Hanafis. He, in case of homicide by mistake, does not hold the offender to be deprived of the inheritance from the said ancestor.²¹

Shafi'i View : Imam Shafi'i, concerning the deprivation of inheritance from the murdered person, holds an extreme view. He upholds deprivation of the inheritance not merely in case of homicide by mistake but if the person concerned is connected with the manslaughter of his ancestor, in any manner whatsoever, he shall stand deprived of the inheritance from him. Thus, according to him, the complainant in a false case of murder resulting in execution of the accused, the executioner, the witnesses, all of

¹⁹Abu Zahra : op. cit., p. 126.

²⁰Al-Sarakhsi : op. cit., vol. xxx, p. 46-47.

²¹Al-Abi : op. cit., vol. ii, p. 338; Al-Sarahsi : op. cit., vol. xxx, pp. 47-49.

them shall stand deprived of the inheritance from the person executed and they shall not get anything from the estate left by the former.²²

Hanbali View : According to Hanbali school of *fiqh*, every such murder deprives the murderer of the inheritance from the person murdered in consequence of which the murder is held liable to any kind of punishment, whether the murderer is held liable to any kind of punishment, or whether the punishment consists of 'blood for blood' or 'blood money' or *kaffarah* (penalty). But the homicide which is not held punishable shall not be the cause of deprivation from inheritance to the estate of the deceased ancestor.²³

Shi'i View : Shi'ah Imamiyah (*Ja'fariyyah*), in the event of homicide by mistake, do not hold the murderer as deprived from inheritance.²⁴ Thus, according to the Shi'ah Jurists 'intentional homicide' shall be an impediment to the inheritance, but not the 'homicide by mistake'. There is another view also that in the event of 'homicide by mistake' the offender (if an heir) shall not be given his share out of *diyat*. This view has due approval of the Shi'i 'ulama.²⁵

Zōhiri View : The Zahiris, in the matter of 'homicide by mistake' appear to be in agreement with the Hanafis, in depriving the offender from inheritance to the estate of his ancestor so killed.

The Basis :

The authority for the jurists' view is the holy Prophet's tradition, "There is no inheritance for the murderer."²⁶ Another tradition is reported from Haḍrat Ibn Abbas wherein it is stated, "One who murders any one, the murderer shall not be the heir of the murdered, though there be no heir of the murdered except the murderer; even though he be the father or the son (of the murdered) there shall be no inheritance for the murderer."²⁷

²²Ibn Qudamah al-Maqdisi ; op. cit., vol. vii, p. 163; Abu Zahra ; op. cit., p. 124.

²³Ibn Qudamah : op. cit., vol. vii, p. 162; Abu Barkat : op. cit., vol. ii, p. 412; Sharafuddin al-Maqdisi : op. cit., vol. iii, p. 123; Al-Kharqi, Umar b. al-Husain (d. 344 A.H.): *Al-Mukhtasar*, Demascus, 1384 A.H., 1964 A.D., p. 126.

²⁴Al-Tusi, Abu Ja'far b. Al-Hasan : op. cit., vol. iv, pp. 193-94.

²⁵Al-Hilli : op. cit., vol. ii, pt. iv, p. 182.

²⁶Al-Tirmidhi, *Jōmi'* : op. cit., p. 307 :

”عن ابى هريرة عن النبى صلى الله عليه وسلم قال القاتل لا يرث”

²⁷Ibn Qudamah : op. cit., vol. vii, p. 161 :

”قال رسول الله صلى الله عليه وسلم: من قتل قتيلا فانه لا يرثه وان لم يكن وارث

غيره وان كان والده فليس للقاتل شيء” -

Analysis : Imam Tirmidhi narrating the first tradition has reservations as regards its chain of authorities. But at the same time he has added that jurists have duly acted on the maxim "The murderer does not inherit from the murdered ancestor whether the murder be intentional or by mistake". Some 'Ulama have said that when homicide is by mistake the murderer shall get the inheritance. Similar is the assertion of Imam Mālik.²⁸ Ibn Mājah has also reported the same text on his own authority. Only one of his narrators, Muhammad b. Rabī' is new among them and the rest are the same that have been relied upon by Tirmidhi. But Ibn Majah has, in this connection, reported from Hadrat Abu Qatadah an incident of Hadrat 'Umar : "Abu Qatadah, who belonged to the tribe of Banu Mudlaj, murdered his son. 'Umar imposed and took from Abu Qatadah hundred camels as *diyat* (blood money), which is legally fixed for it. Giving away those camels to the brother of the murdered, Hadrat Umar said, "I have heard the Prophet of God saying, 'There is no inheritance for the murderer.'"²⁹

'Allama Shawkāni has recorded that Abu Dā'ud has narrated a similar text from 'Amru Ibn Shu'aib through the chain of authority of the grandfather of Shu'aib. And Imam Nasa'i stating the text from the same chain of authority has categorised his own chain of authority to be *ma'lul* (mixed one). Dār Qutni and Ibn Abdul Bar while narrating the text have supported the said chain of authority. Imam Shafi'i, Abdul Razzāk and Baihaqi have narrated the same tradition as being *Munqa'a'* (disconnected). However, Baihaqi pointing out another chain of authorities has stated the text of this tradition to be connected, *muttasil*, upto the Prophet. Dār Qutni and Baihaqi have on their own chains of authorities narrated the same text from Hadrat Ibn Abbas. But each of these two chains of authorities is open to one objection or the other. Tabrani in the incident of Abu al-Kathir al-Ajsha' and Khattābi in that of about 'Addi al-Juzāmi have reported similar texts of the tradition noted above. It should be noted that the chains of authorities on which this tradition has been reported by Abu Dā'ud therein occurs the name of Muhammad b. Rāshid al-Dimashqi al-Makhuli whose antecedents have been questioned by some traditionists, whereas according to some others he is reliable.³⁰

²⁸Al-Tirmidhi : op. cit , p. 307 (Chapter on *Farā'id*) :

"والعمل على هذا عند اهل العلم ان القاتل لا يرث، سواء كان القتل خطأ او عمدًا وقال بضمهم اذا كان القتل خطأ يرث و هو قول مالك"

²⁹Ibn Majah : *Al-Sunan*, Karachi, p. 190.

³⁰Al-Sawkani (d. 1250 A.H.) : *Nail al-Awtār*, Cairo, 1380 A.H., 1961 A.D., vol. vii, p. 80.

Qur'anic Illustration : There is strong denunciation by God in the Qur'ān regarding an unjustifiable murder. It is stated in Surah *Al-Nisā'* "Never should a Believer kill a Believer, but (if it so happens) by mistake, (compensation is due). If one (so) kills a Believer it is ordained that he should free a believing slave, and pay compensation to the deceased's family, unless they remit it freely. If the deceased belonged to a people at war with you and he was a Believer, the freeing of a believing slave (is enough). If he belonged to a people with whom you have a treaty of mutual alliance, compensation should be paid to his family and a believing slave be freed. For those who find this beyond their means (is prescribed) fast for two months running, by way of repentance to Allāh. For Allāh hath all knowledge and all wisdom (IV : 92)." "If a man kills a Believer intentionally his recompense is Hell to abide therein (for ever), and the wrath and the curse of Allāh are upon him and a dreadful penalty is prepared for him" (IV : 93).

As for the holy Prophet's traditions referred to above, the result is that the heir is deprived of the right of inheritance on the ground of his murdering his own ancestor. On the basis of this argument the deprivation from inheritance of an intentional murderer stands well authenticated. However, in case of 'homicide by mistake' there is difference of opinion among the Hanafi and Māliki jurists, as discussed in detail below.

Imam Mālik's View : Imam Mālik, arguing about his own view of non-deprivation of the murderer from the inheritance of the ancestor, in the event of killing his ancestor by mistake, says that, firstly, the person who murders unjustly the person from whom he is to inherit, really commits the crime with the intent and purpose of acquiring the inheritance earlier than due. Hence, as a punishment, he shall be deprived of the inheritance from the murdered person. But this intent and purpose are non-existent in a murder which, though unjust, is committed by mistake. Hence there shall be no deprivation from the inheritance by such a murderer. Secondly, the person who commits a mistake is excusable in law and is not to be punished. He further argues that in case of mistake the law also shows mercy. On this ground as well he shall not be deprived from the inheritance. However, so far as the blood money is concerned which the family of the murderer pays to the heirs of the murdered person, the murderer shall not be entitled to get anything out of it.

Thus, in Zarqani's *Sharh al-Muwattā'* of Imam Mālik a tradition has been reported: "If an heir kills his ancestor by mistake, the assailant shall be the heir to the personal property of the murdered but shall not be the heir to the property that is received as blood." Dar Qutni has also stated

this tradition with the same text. Though Dār Qutni's chain of authority is weak it is strengthened by the unanimity and practice of the people of Madina. Further, according to Imam Malik, the imputation of attempt to acquire the inheritance earlier than due can not be naturally made in the case of murder by mistake. This imputation in the case of intentional murder is the cause of the murderer's deprivation from the inheritance. And this cause, in the case of 'homicide by mistake', is completely absent. Imām Malik has, therefore, laid down that the preferable interpretation is that the murderer, in case of a 'homicide by mistake', is the heir to the personal property of the murdered ancestor but shall not be the heir to the property received as 'blood money', as the matter of applicability and non-applicability of any act depends on the cause ('*illat*').³¹

The Principle : Deprivation from inheritance on account of committing murder of the ancestor is based on the principle that a person, guilty of securing a thing prior to its natural time, shall have to undergo the punishment of being deprived of that thing.³² Under the same principle, if the legatee murders the legator, the 'Will' shall become void, because the person who desires to have benefit of a thing prior to its due time shall be punished by being deprived of the benefit of that thing. Thus a person desiring to get the inheritance sooner murders his ancestor 'intentionally', or 'with *Quasi* intention', or 'by mistake' shall be deprived of the ancestor's inheritance and shall not get it. But in the case of 'indirect homicide' (*Qatl bil Tasabbub*) he shall not be deprived of it, because he is not the killer or an accomplice. This is according to Hanafis.

Hanafis arguments : The Hanafis in support of their view that in both 'the intentional murder' and 'the murder by mistake', the murderer shall be deprived of the inheritance, contend that murder is an act which is forbidden and the deprivation of the murderer of the right to inheritance of the murdered is, in fact, the punishment for that murder which is forbidden. For

³¹Al-Zarqani : op. cit., vol. v, p. 167 :

”وإن قتل صاحبه خطأ ورث من ماله ولا يرث من دينه. رواه الدارقطني بإسناد ضعيف لكنه اعتضد باتفاق أهل المدينة عليه، وقد اختلفت في أنه يرث من ماله لا يتهم على أنه قتله ليرثه وليأخذ ماله الذي علة منع أثره في قتله عمداً فإذا انثقت العلة يكون القتل خطأ. ورث من المال إلا يرث عملاً بعموم قوله صلى الله عليه وسلم ليس للقاتل شيء، فأحب القولين إلى أن يرث من ماله ولا يرث من دينه، لأن الحكم يدور مع العلة وجوداً وعدماً.”

³²Al-Majallah al-Ahkām al-Adliyya, Karachi, Section 99 :

”من استعجل بالشئ قبل أوانه عوقب بحرمانه.”

Al-Alūsī : *Sharh al-Majallah*, Hims, vol. i, p. 268.

anyone to commit a crime even by mistake should be forbidden. A forbidden act is contrary to being lawful. Because of this in committing 'murder by mistake' the 'act of murdering' does not become lawful; and the one acting thus cannot be imagined to have committed the murder lawfully. That is why the compensation for committing the crime of murder shall have to be paid. As '*wrong action*' cannot be imagined to become the right '*action*', likewise the '*unlawful*' act cannot be imagined to have become '*lawful*' by mistake.

The second contention of the Hanafis is that 'murder by mistake' is also forbidden. It is on this basis that penalty for it is obligatory, which punishes (the crime) and obviates the sin. Had 'the homicide by mistake' been legally excusable there should have been no provision of any penalty (*kaffarah*) for it. When there is such a provision for it, the deprivation of the murderer from inheritance shall also follow validly. The Hanafis maintain that in 'murder by mistake' there is, in fact, equally good hastening of the devolution of interest of inheritance. It is just possible that one may have made the attempt of hastening the devolution of interest of inheritance through 'murder by mistake.' It is equally just and necessary to prevent 'murder by mistake' and even such a suspicion should be enough to deprive the person causing death of the ancestor. Hence, according to Hanafis, each murder, in committing whereof the murderer has taken part, whether it is intentional murder or murder by mistake, shall be the cause of depriving the murderer of the inheritance of the murdered person. But the murder that has not been committed by him personally, nor he is an accomplice to it, but he is only indirectly related to the murder, shall not be the cause of depriving him from the inheritance. For instance, a person digs a well and accidentally his ancestor falls into it and dies, or a person places a stone on the path and his ancestor stumbling over it falls and dies, or a person extends the balcony of his house and that falls on his ancestor and he dies. In all these cases, these persons shall not be deprived of inheritance because they cannot be held to be murderers and no 'blood for blood' or penalty shall, in such cases, become due on them. The reason is that there arises no cause, in the above-noted instance, on the basis of which these persons may be charged that they in order to acquire the inheritance sooner must have acted so. It can not be said that by taking such above-mentioned actions they intended to murder their ancestors. How could they know that their ancestor shall fall into that well, or by stumbling over the stone he shall die, or the balcony shall fall on him. The basic cause of deprivation from estate is to commit forbidden murder. Deaths in the manner stated above are not murders at all. Hence the person charged with them shall not be deprived from the inheritance.³³

³³Al-Sarakhsi : op. cit., vol. xxx, pp. 47-50.

Modern Legislation :

Under the current Egyptian Law murdering intentionally one's own ancestor shall deprive that one of the inheritance of his ancestor, whether he is the principal murderer or is an accomplice in the murder, or the death is caused of his false evidence provided the death so caused is without any justification and legal excuse, and the murderer is sane and has attained the fifteen years of his age. But it has also been provided therein that, in the under-noted cases, intentional murder shall not be a bar to inheritance :—

1. When the offender has not, according to the solar calendar, attained the age of ten years.
2. When there is some justifiable cause or under the criminal law the offender deserves mitigation in punishment.
3. When the offender has not exceeded the right of self-defence.
4. When the adulteress wife is killed by the husband at the spur of the moment,³⁴ when she is caught in the act.

Under the Lebanese and Egyptian Laws, as in force, the killing of the person who kills, is not penalised under the maxim of 'blood for blood', nor with deprivation from inheritance, in exercise of the right of private defence of one's own life and property as well as the life and property of others provided there is no other possible way to safeguard the same and limits prescribed by Law have not been exceeded. On the same principle, the executioner's act of executing the one whom he has been ordered to execute the death sentence, has been saved as an exception.

However, the Egyptian Law of Inheritance No. 77 of 1943, incorporating Imam Malik's practice does not deprive the murderer in 'homicide by mistake' from the inheritance of the ancestor so killed. Same is the so Law in Morocco (Section 230). The same rule applies to witness who deposes falsely to prove the charge of murder. The one who commits murder by mistake shall be the heir to the personal property of the ancestor but shall not be the heir to his blood money and he shall be in proper circumstances be the excluder of other heirs. Similarly, Egyptian Law of Wills No. 71 of 1946, following the Maliki rule, holds execution of Will in favour of the murderer, in 'murder by mistake' as valid.

³⁴Umar Abdullah : *op. cit.*, p. 94.

Indo-Pakistan Courts' Decisions :

The principle of deprivation from inheritance of murderer on account of his committing intentional murder of his ancestor has been constantly applied in the courts of Indo-Pak sub-Continent as well. Thus it has been held in the case of *Mst. Shah Khanam vs. Qalandar Khan* (PLR 1900, p. 455 = 74PR 1900) that in the interest of public policy, no criminal can take benefit of his criminal act; the person who is proved to be the helper in the murder of the murdered person cannot be the heir to the estate of the murdered person. Similarly in Pakistan, Mr. Justice Sajjad Ahmad Jan, Judge of the West Pakistan High Court, who later retired as Judge of the Supreme Court of Pakistan, held in the case of *Beguman vs Saru* (PLD 1964 Lahore 451) that "the rule of Law is well settled that under the principles of justice, equity and good conscience a murderer of his progeny cannot be allowed to benefit by his crime of murder. The murderer may be the father alone, but if the descendants claim through him even though not merely from him their title becomes tainted as the source or the channel through which the inheritance has to flow to them becomes blocked and extirpated by reason of the crime committed by that source". The above decision of the Lahore High Court seems to have extended the effect of homicide as an impediment to inheritance. Under the traditional Islamic Law it is only the killer who is deprived from inheritance to the estate of his ancestor. But this decision has resulted a homicide in deprivation of the killer as well as the heirs of the killer from the inheritance of the ancestor killed and not only to the estate of the killed one but of his heirs too.

The facts of the case as reported in the above said decision were that in 1948 Dara was convicted and hanged for the murder of his two nephews, the only sons of his brother Rahman and his wife Beguman. When Rahman died in 1951 his nearest surviving relatives were his wife Beguman, his two daughters and his two nephews, Saroo and Manak, the sons of the murderer Dara. It was decided by both the courts below that Beguman was entitled to one-eighth, the two daughters to two-thirds and the two nephews, as residuaries to 5/24 of the deceased Rahman's estate. Against this decision Beguman filed a second appeal in the High Court, claiming, that the newpews were not entitled to any share of the inheritance since it was only through their father, who had murdered Rahman's sons that they had been let in as the nearest residuary heirs. The High Court allowing this appeal held that Dara's (murderer's) sons were deprived of the inheritance of the father of the murdered. This decision seeks to extend the application of the rule of deprivation from inheritance to the estate not only of the killed one but it also deprives from the estate of the deceased's other members of his family. Similarly the judgement seeks to disinherit not only the murderer alone but

his heirs (issues) also from getting inheritance to the estate of the murdered as well as from his heirs. This judgement of the High Court is contrary to Hanafi law, while the courts below had decided the case correctly. The learned judge of the High Court, as he then was, did neither cite any authority or precedent nor referred to any book on *fiqh*. He seems to have been led away by his own notion of equity, justice and good conscience.

This writer, however, could not find any ruling of the Indian or Pakistani Court regarding deprivation from inheritance to the estate of the victim in consequence of his 'murder by mistake'.

Conclusion :

According to this writer, in the matter of 'murder by mistake' the formulation of Imam Malik appears to be preferable as compared to the views of other Imams. The traditions that have been cited from both sides have been reported through weak chains of authorities. In the same way as the other Imams consider the consensus of the learned Jurists to be the source of the strength of the above referred traditions. Imam Malik considers practice of the people of Madina to be the source of strength of his arguments. In fact, he considers the generality of the tradition, "ليس للقاتل" (Nothing to the murderer) to have been particularised by the tradition "وان قتل صاحبه خطأ ورث من ماله ولا يرث من ديتيه" "He who kills by mistake inherits in the estate but not in blood money. According to him the first statement of the Prophet, though general, is particularised by the other statement. This is analogous to the exegetic rule concerning the Qur'an viz. that the general verses in the 'Book of God' are particularised or qualified by other verses therein. On the same principle one tradition may be the cause of making particular interpretation of the other tradition. Again, if the above discussed verses of the 'Book of God' that refer to heinousness of killing are considered, the views of Imam Malik get further support and strength from their analogy too. The Qur'an declaring the severest punishment for one committing intentional murder, lays down 'hell to the murderer who intentionally kills a Muslim'. The degree of punishment that has been stated in this verse shows that God has deprived such murderers from worldly as well as heavenly blessings. Thereafter, making an exception in the case of 'murder by mistake' from this punishment God says, "Never should a Believer kill a Believer; but (if it so happens) by mistake, (compensation is due) : If one (so) kills a Believer, it is ordained that he should free a believing slave. And pay compensation to the deceased's family unless they remit, it freely. From this verse it appears that God has radically reduced the punishment for 'murder by mistake' compared to the punishment for 'intentional murder'. It may, therefore, follow that the one who commits murder

by mistake' is not to be liable to that extent of deprivation that has been fixed for the one who commits 'intentional murder'.

Imam Malik in support of his ruling also puts forward the saying of the Prophet, "رفع عن استى الخطاء والنسيان وما استكرهوا عليه", which mean, *inter alia* the 'one that who commits mistake' is not responsible for his act and there shall be no accountability for him for his act. In the light of this tradition his being deprived from inheritance on account of his act 'committed by mistake' shall be contrary to the above-stated tradition. (The reliance on this tradition by Imam Mālik, according to this writer, is entirely misplaced in as much as this tradition related to the accountability in the world hereafter).

The argument of the Hanafis, on the other hand, is that the murder, though committed by mistake, is not in any case, lawful, that is why 'blood money' and penalty are fixed in the 'Book of God' as punishment, which is the proof that even 'murder by mistake' is a crime. According to this writer, the answer to that view would be that the provision regarding 'blood money' and penalty (*kaffarah*) in case of murder by mistake in the 'Book of God' has two aspects. The first is the same that has already been stated by the Hanafis, namely, that the act of 'murder by mistake' is a crime and it is on this basis that 'blood money' and 'penalty' have been fixed as punishment. The second consideration is that 'blood money' and penalty (*kaffarah*) has been prescribed on account of maintaining the sanctity of life which is a venerable object in any case. It is also imposed to show that the blood of a human being is precious in the eye of the Creator and its spilling displeases Him. Anyhow, the first reasoning may be held as the real rationale, for murder by mistake is, after all, an injury caused to the person concerned and his family. Imam Malik though gets support from the text of the verse of the 'Book of God' itself, but making an exception from an act, which is under law a crime, need not be a complete wash off. It may be a lesser crime because of some ingredient missing and thus liable to a lesser punishment.

However, the conclusion that murder has been committed by mistake can only be arrived at when it gets so proved satisfactorily before the Court. The means to this end are generally the evidence and compelling circumstances. The Court has to come, as far as possible, to the correct decision in view of the compelling circumstances. Imam Shafi'i himself has said that the Qaḍi has to make his earnest effort to find the truth. The purpose is that the Court through evidence, direct as well as circumstantial, must come to the conclusion that the murder has in fact been committed by mistake. It is only then that the murderer shall not be deprived of the inheritance.

So far as deprivation from the inheritance in 'murder committed through some indirect cause' (*Qatl bil Tasabbub*) is concerned, if the murder occurs merely through a cause, and of the cause there appears to have no concern with the intention of murder, in such a case, the rule of deprivation from inheritance shall not be made to apply. But if the murderer, however, does something with a preconceived plan of causing death of which the proof is obtainable the murderer even in 'indirect murder' should be held deprived of the inheritance. Thus, in the case of 'murder committed through some cause' if the intention of committing murder is concealed in the adoption of certain course by the one who commits it e.g. intention which is instrumental to the murder is proved, in that case the order of deprivation from inheritance shall have to be passed. But in a situation where the ancestor himself, in the first instance, attacks the heir apparent and he, in order to save his life under the right of self-defence, kills the ancestor, in such a case the killer shall not be deprived of the inheritance. This is an agreed rule with the Hanafis, Mālikis and Hanbalis. Imam Shafi'i, however, does not agree with this. According to him in homicide, in whatever form it may be, the killer must be deprived of the inheritance from the ancestor. Imam Shafi'i, in case of homicide extends the deprivation from inheritance to all the persons committing it even minors and insane.³⁵ This writer begs to differ from Imam Shafi'i on this point, in as much as deprivation from inheritance is the punishment of unjustifiable murder. The acts of minor or insane stand as exceptions because of their incapacity. The condition of being responsible for these acts is not found with the minor or insane. Besides, the mandate of deprivation from inheritance against the murderer is based on the rule of penalising the hastening of the inheritance. Legally, no imputation can be made against the minor or the insane of the attempt of hastening the inheritance. Deprivation from inheritance occurs on account of omission to avoid a crime, and this omission can be ascribed to a responsible person because he is a fit person to be ascribed with the omission. On the other hand, an insane and the minor cannot be ascribed with any act or omission. They are not legally fit to be ascribed with volition like adult and discreet persons. The viewpoint of Imam Shafi'i is based on extreme piety and caution but assuredly it goes against the set legal principles.

Section 321. Neither a non-Muslim shall be the heir of a Muslim nor a Muslim shall be the heir of a non-Muslim.

Difference of
religion

³⁵ Al-Sarakhsi : op. cit., vol. xxx, p. 48 :

”واما الصبي و المجنون اذا قتل مورثه لم يحرم عن الميراث عندنا وعند النافعي يحرم عن الميراث لوجود القتل بغير حق“.

COMMENTARY

Unlike the law of Wills wherein the difference of religion between the legator and legatee does not bar the getting of legacy, the difference of religion, i.e. the difference of unitarianism and polytheism between Muslim and non-Muslim ancestor and heir is an impediment to inheritance. The Muslims between themselves can be the heirs to each other, but a non-Muslim cannot get inheritance from a Muslim by any relationship either through lineage or through affinity.³⁶ On this, there is a complete unanimity of the Jurists of the 'Ummah. However, there is a difference of opinion on a Muslim getting inheritance from a non-Muslim. According to most of the Jurist-Companions of the Holy Prophet, a Muslim shall not be the heir to a non-Muslim. Same is the assertion of Hanafis and Shafi'is. Among the Companions, according to Hadrat Mu'ādh bin Jabal and Mu'āwiyah bin Abu Sufyān and among the Tabi'ūn (Successors) according to Hasan al-Baṣri, Muhammad Bin Hanafiyah, Muhammad bin Abu Al-Hussain and Masruq, a Muslim shall inherit from a non-Muslim. In support, they rely on the saying of the Prophet, "*Al-Islam Ya'lū wa lā Yu'lā*" i.e. Islam governs and is not governed. Getting inheritance is also a kind of superiority in status. Islam predominates in status over disbelief. Therefore, on the basis of the aforesaid tradition, a Muslim has the right of inheritance from a non-Muslim ancestor, they assert.

Imam Sarakhsi in his book, "*Al-Mabsūt*" referring to their contentions has written that the right of heirship is a kind of dominion and a non-Muslim has no dominion over a Muslim; on the other hand a Muslim has dominion over a non-Muslim. That is why, (according to the aforesaid persons) a Muslim shall be the heir to the estate of a non-Muslim. Besides, according to a general principle, a Muslim may be the heir of a non-Muslim because if there is no heir of a *Dhimmi* (non-Muslim citizen of the Muslim state) in the *Dār al-Islam* his estate shall belong to the public treasury of the Islamic State, wherein all the Muslims have their rights. A similar principle is applied to a case where a Muslim, in certain circumstances, is the heir to an apostate but the apostate is never the heir of a Muslim. In support of this view another tradition of the Prophet, "*Al-Islam Yazid wa la Yanqus*" is put forward. That is to say, Islam is the means of enhancing (the rights), and not of diminishing them. Thus, it is argued, a non-Muslim who is originally entitled to get inheritance from his non-Muslim relatives,

³⁶*Ibid*, p. 30.

shall not be held deprived of it after his acceptance of the faith of Islam; otherwise it shall necessarily follow that Islam is the cause of diminishing his rights. This cannot be valid.

But the reasoning of the most of the jurists is based on the Prophet's tradition narrated by Bukhari and Muslim that "the people belonging to two (different) faiths do not inherit from each other."³⁷ A Muslim does not inherit from an infidel and (so) an infidel does not inherit from a Muslim. These jurists also put forward, in their support, the verse from the Qur'an, viz. "وَالَّذِينَ كَفَرُوا أَوْلِيَا بَعْضُهُمْ بَعْضٌ" infidels among themselves are guardians of each other. From this verse the establishment of guardianship between Muslims and non-Muslim has been expressly negated. The same doctrine shall apply to their dis-entitlement of inheritance. According to Imam Ahmad b. Hanbal, however, if a non-Muslim heir of a Muslim accepts the faith of Islam before the division of the estate he shall be his heir.³⁸

Shi'ah Imamiyah : According to Shi'ah Imamiyah the difference of religion shall be an impediment to inheritance in the manner that the infidel shall not be the heir to the Muslim but the Muslim shall be the heir to infidel.³⁹

Zahiriyyah : Imam Ibn Hazm has written in his book, "Al-Muḥallā" that infidels cannot inherit from Muslims and the Muslims cannot inherit from the infidels.⁴⁰

Conclusion :

The Prophet's tradition that Bukhari and Muslim have reported in their "Sahih" is, on this question, a clear exposition of law. The traditions on which the other jurists rely are of general import and have no direct bearing on the subject. As such, they cannot be accepted as binding in view of the above tradition which is quite clear on the subject. According to this writer too, it appears to be correct that as a non-Muslim cannot be the heir of a Muslim,

³⁷Al-Bukhari ; *Ṣaḥīḥ*, Karachi, vol. ii, p. 1001; Al-Muslim : *Ṣaḥīḥ*, with commentary by Nawawi, op. cit., vol. xi, p. 52 :

"ولا يتوارث اهل ملتين بشئ لا يرث المسلم الكافر ولا يرث الكافر المسلم"

³⁸Al-Sarakhsi : op. cit., vol. xxx, p. 31; Al-Jurjani : op. cit., p. 14; Ibn Qudamah al-Maqdisi : op. cit., vol. vii, p. 171.

³⁹Al-Tusi : *Al-Istibṣār*, Najaf, 1956 A.D. vol. iv, pp. 189-90.

⁴⁰Ibn Hazm : op. cit., vol. vi, p. 371.

on the same principle, a Muslim should not be held to be the heir of a non-Muslim.

Modern Legislation :

Under Section 6 of the Egyptian Law of Inheritance No. 77 of 1943, no inheritance shall take place between 'Muslims' and 'non-Muslims'. Same is the law in Morocco (Section 229). Syrian law is also to the same effect (See Section 223 and 264).

Indo-Pakistan Law :

The rule that the difference of religion is a bar to inheritance remained unchanged in India and Pakistan. Thus in *Chandrashekharapas v. Government of Mysore*, A.I.R. (1955), Mysore 26, a Muslim widow, who had been converted before her marriage from Hinduism to Islam, died intestate and without issue. Since it was held that Islamic law applied, her Hindu brother's claim to be her legal heir failed on the ground of his different religion.

Section 322. Apostasy is an impediment to inheritance. An Apostasy apostate, therefore, (whether male or female) shall stand deprived of the inheritance from his or her Muslim ancestor.

(2) The apostate shall further be deprived of the property that he acquires after apostasy which shall belong to *Bait al-Māl*. However, the Muslim heirs of the apostate shall be the heirs to the property which the apostate may have acquired in the state of being a Muslim.

Exception : The heirs of an apostate woman shall be entitled to her property belonging to her both in the state of her being a Muslim and an apostate.

COMMENTARY

The person who after uttering the words of repudiation of Islam turns from Islamic Faith to any other faith, or accepts no faith at all is called an apostate. The dictionary meaning of apostasy is 'turning back'.⁴¹

⁴¹Damad Afandi : op. cit., vol. i, p. 682.

Apostasy too is one of the impediments to inheritance. This impediment is not real; rather it is conditional and arises due to the person's abandoning Islam and turning towards another faith or to no faith at all.

The Sunni View :

If the apostate is killed or dies or starts residing in *Dār al-Harb* (non-Muslim State), whatever he has earned in the estate of his being a Muslim, shall be inherited by his Muslim heirs and whatever his properties are in the state of his being an apostate shall be the property of *Bait al-Mōl*. This is the view of Imam Abu Hanifah. According to *Sāhibain*, the Muslim heirs of the apostate shall be the heirs of both the properties acquired by the apostate in both periods, whether during his being a Muslim or an apostate. But, according to the Hanafis unanimously if an apostate woman dies, her property shall be divided among her Muslim heirs, although the woman may have acquired the property before or after her turning an apostate. According to Imam Shafi'i and Imam Malik the properties acquired and earnings made by him or her during both the periods shall belong to *Bait al-Mōl*. According to Zahirī no one shall be the heir of an apostate, nor the apostate can be the heir of anyone. The property he or she leaves behind shall be the property of the *Islamic State*.

An apostate's wife, provided she is a Muslim shall be his heir. Same shall be the case where her apostate husband dies during her observing the term of probation by separation or divorce. If the apostate dies after the expiry of the term of his wife's probation, she shall not be entitled to get the inheritance. An apostate, on principle, is in the position of one escaping from (inheritance by) his wife. She is like the wife of a husband who, during his death sickness, tries to avoid inheritance to his wife by pronouncing irrevocable divorce to her who, in the event of death of her husband (during the observance of her term of probation), is his heir. If the wife alongwith her husband turns an apostate, she shall get no inheritance just as the apostate's relatives who are non-Muslims are not the heirs of the apostate.

An apostate does not get inheritance from any one as he, turning an apostate, has committed a sin. Getting deprived (as punishment) of inheritance is the legal result of apostasy in the same way as the murderer, because of his unjustifiably committing homicide, gets deprived of the inheritance from the person killed. The apostate, according to Imam Malik and Shafi'i, is neither himself the heir of anyone, nor anyone is the heir to the estate left by him. Whatever he earns whether in the period of his being a

Muslim or in the period of his being an apostate, is the property of *Bait al-Māl*.

When the husband and wife together turn apostates and a child is born thereafter, if the child is born within six months of the day of their turning apostates, it is certain that the child was present in the womb of its mother at the time when its parents were Muslims. The child shall, therefore, be held to be a Muslim, and because of its parents turning apostates shall not be held to be an apostate, while living in *Dār al-Islam* (a Muslim state). Hence the child shall be considered to be a Muslim and the heir of the apostate. But if the child is born *after* six months of the day of its parents turning apostates, the child shall not be entitled to get the estate from its apostate parents, although the marriage contract between them is continuing, because in such a case conception shall be taken to be at a time when the parents were apostates and no apostates inherit from each other in *Dār al-Islam*.⁴²

Shi'ah View :

According to Shi'ah Imamiyah, the apostate shall not be the heir to any Muslim but the Muslim shall be the heir to the apostate. But, according to them, if a born infidel after accepting Islam again turns back to his old faith his estate shall be held divisible at once, whether he is dead or alive, provided he is a male. If it is a female her estate shall not be divided till she is alive. However if a born Muslim turns apostate his estate (property), prior to his being killed or dead, shall not be divided.⁴³

Current law in India and Pakistan :

In India and Pakistan the traditional *Shari'ah* law concerning apostates was superseded by the Caste Disabilities Removal Act, 1850, which provided that :

So much of any law or usage.. as inflicts on any person forfeiture of rights or property, or may be held in any way to impair or affect any right of inheritance by reason of his or her renouncing or having been excluded from the communion of any religion shall cease to be enforced as law.....

This provision of law being in conflict with the injunctions of Islam was amended by a provincial Act known as Caste Disabilities Removal (West Pakistan Amendment) Act, 1963 as under :

⁴²Al-Sarakhsi : op. cit., vol. xxx, p. 37; Al-Jurjani : op. cit., p. 114.

⁴³Al-Hilli : op. cit., vol. ii, pt. iv, pp. 181-82.

"Provided that nothing contained in this Act shall apply to the rights of inheritance to the property of a Muslim." (Also see Author's "*Islamization of Pakistan Law*" 1978, Karachi, pp. 10-13.

Section 323. Between those who die simultaneously such as by being drowned or burned together and the relationship existed between them, they shall not be the heirs to each other if it is not known who died first and who died later. In such an event the estate shall be divided between their existing heirs.

Uncertainty of
death of ancestor
and heir

COMMENTARY

In the discussion of 'impediments to inheritance' the uncertainty as to the time of death of the ancestor and the heir is also an impediment where the ancestor and the heir both die together and it is not known as to who died first and who died later. For example, a few relatives who are heirs among themselves die together by being buried under a falling wall or roof, or they all die when on a ship by the sinking of the ship or by the crash of the aeroplane, or they are killed in some war, and it is not known as to who died first and who died later, in such events, they cannot be the heirs of each other. Thus, if the father and the son die together in an aeroplane crash, neither the father shall be the heir of the son nor the son shall be the heir of the father. The estate of the father shall be divided between his existing heirs and the estate of the son shall be divided between his existing heirs. This is the Hanafi rule. Maliki, Shafi'i and Hanbali views are also the same.⁴⁴

Hadrat Abu Bakr, 'Umar and Zaid b. Thābit all agree on the question that when it is not known as to who died first no one of them shall be the heir of the other. The estate of all of them shall belong to their existing heirs. Same is the decision given by Zaid b. Thābit in the cases of those killed in the battle of Yamama and those who died of plague at 'Ainwās, and those who were killed at Hurrah. The same rule has also been narrated from Hadrat Ali concerning the estate of those killed in the battles of "Jamal" and "Siffin". It is the verdict also of Hadrat Umar bin Abdul Aziz and of the jurists in general.

⁴⁴Ibn Qudamah al-Maqdisi : op. cit., vol. vii, p. 186; Tahir b. Muhammad : op. cit., vol. ii, p. 420.

Basis :

The basis of this rule is the narratives of the Companions of the Holy Prophet, and the Qiyas also demands it. The cause of the inheritance is the existence of the heir at the time of the death of the ancestor. For example, Zaid and 'Umar who both could be the heir of each other die together in an air-crash. If Zaid is held to be the heir of 'Umar, it shall have to be proved that 'Umar died first and Zaid died later. Because of their dying together in an air-crash or either by being burnt or by being drowned, the death of 'Umar cannot with certainty be proved to have occurred first or last. Hence the estate of those who die without it being known as to who died first and who died last shall be divided by their existing heirs.⁴⁵

Modern Legislation :

The laws of Egypt, Syria, Tunisia and Morocco on this question are all in accordance with the above rule.

⁴⁵Al-Jurjani : op. cit., p. 142; Al-Sarakhsi : op. cit., voi. xxx, p. 37; Al-Firozabadi : op. cit., vol. ii, p. 26; Ibn Qudamah al-Maqdisi : op. cit., vol. vii, pp. 186-77.

CHAPTER XXXIX

Exclusion and Deprivation

Section 324. Due to the existence of one person deprivation of the other person from getting inheritance is called "exclusion". The deprivation may either be from the entire or a part of the inheritance.

COMMENTARY

From the different situations of the heirs mentioned in the foregoing chapters it is apparent that there are some heirs of the deceased who due to some impediment to the inheritance, such as the committing of murder of the ancestor, believing in different faith, are disinherited or, in other words, are "deprived from inheritance." But there are some relatives who because of the presence of a nearer one "are excluded" and get no share in the property of the deceased. The first situation is generally termed as "*Hirmān*", whereas the second situation is known as "*Hajab*". Although the words, "*Hajab*" and "*Hirmān*" are synonymous but in the terminology of inheritance there is a minor difference between the two. The term "*Hirmān*", i. e. deprivation, (from which the word *Mahrūm* has been derived) is used in a situation where the eligibility of getting the inheritance itself ends or terminates. But where the eligibility being intact but an obstruction in between is created, had the same been not created the person would have got the inheritance, there the term "*Hajab*," (derivation, *Mahjub*), i. e. exclusion (from inheritance) is used. The obstructor for whose presence exclusion takes place is called "*Hājib*", and the heir who is obstructed is called "*Mahjub*", such as deceased son's presence excludes the son's son.

There is one more difference between the terms "*Mahrūm*" and "*Mahjub*", the "deprived" and "excluded". According to Hanafis, the deprived ones do not prevent others from inheritance, whereas the "excluded ones" unanimously exclude the others.

Section 325. There are two kinds of exclusion :—Kinds of
exclusion(1) Total exclusion (*Hajab Hirmān*).(2) Partial exclusion (*Hajab Nauqṣān*).**COMMENTARY**

Exclusion being of two kinds depicts two different situations as detailed below :—

Total exclusion :

Where the heir is totally excluded from his inheritance and gets nothing due to the existence of another heir it is called "total exclusion". For instance, the total exclusion of grandfather in the existence of father of the deceased.¹

Partial Exclusion :

Where the heir, due to there being another heir is diverted from his greater share to a smaller share in his entitlement it is called "partial exclusion." For instance, the mother gets one-third in case of there being no issue of the deceased, and in case of there being an issue she gets one-sixth or the husband's share in the event of there being an issue of his deceased wife gets diverted from 1/2 to 1/4 or that the widow gets diverted from 1/4 to 1/8 or that of the father's share gets diverted from the entire property (as Residuary) to 1/6 (as Sharer).

There are six such heirs who do not get totally excluded. Indeed, because of the presence of a *Hājib*, (who obstructs the other from inheritance), they get diverted from greater share to the lesser one, i. e. they suffer from partial exclusion. The six heirs are, (1) Father, (2) Son, (3) Husband, (4) Wife, (5) Mother, and (6) Daughter.

These persons (heirs) never get totally excluded from their inheritance except that getting a lesser share, as indicated above. Besides these six heirs, the persons who get excluded totally are governed by the principles of 'nearer excludes the remote' and 'stronger in relationship excludes the weak one'. For instance, the real brother excludes the real brother's son, or the real brother excludes the consanguine brother.²

¹Tahir b. Ahmad : *Khulasatul Fatawa*, Delhi, 1318 A.H., vol. ii, p. 419.

²*Ibid.*

Some more Instances of 'Exclusion' :

(1) Son excludes the son's son and the son's daughter; and the son's son excludes the son's son's son of the lower degree than himself.

(2) One son or two daughters exclude the son's daughter.

(3) The son or son's son and their male issues and according to Imam Abu Hanifah the grandfather also excludes the brother and sister of the deceased.

(4) The above-mentioned relatives and the full brother exclude the stepbrother.

(5) The above-mentioned relatives or two or more than two full sisters or one brother exclude the stepsister.

(6) The male issues of the deceased and the male issues of their issues and the father and the grandfather exclude the uterine brother.

(7) The above-mentioned '*Asbi* heirs exclude the uterine sister.

(8) The father excludes the grandfather whether the grandfather is the heir because of *Asbah* or because of being *Dhu Fard*.

(9) The mother excludes paternal mother of all the degrees.

(10) The mother excludes the maternal grandmother.

Effect of Exclusion (*Hajab*) on other heirs :

"Persons deprived" (*Mahrūm*) such as the infidel heir or the assassin of the deceased cannot deprive other heirs. On account of the presence of some such deprived person, therefore, no heir can be deprived, neither totally nor partially. But the heir who is excluded (*Mahjūb*), he can exclude the other, such as a brother gets excluded (totally) in presence of the father but partially excludes the mother i. e. the mother gets one-sixth share instead of one-third.³

Due to "Exclusion" being of two kinds, in the first case it excludes the other heir totally and in the second case it does not exclude the heir totally; it only affects him in as much as he gets diverted to a lesser share.

³Al-Jurjani : op. cit., p. 47.

Section 326. There are, as under, three fundamental principles of exclusion :—

Fundamental
principles of ex-
clusion

1. Excluder's direct relationship with the deceased.
2. Excluder's relationship with the deceased being closer compared to that of the excluded one.
3. Excluder's relationship with the deceased being stronger compared to that of the excluded one.

COMMENTARY

1. *Excluder having direct relationship with the deceased* : Under the first principle, the son of the deceased compared to the grandson has direct relationship with the deceased. Likewise, the father of the deceased compared to the nephew has direct relationship with the deceased. Hence the son excludes the grandson and the brother excludes the nephew. Likewise, the father of the deceased excludes the grandfather. There are no intermediary between them and the deceased.

2. *Excluder being closer to the deceased* : The one closer to the deceased, for whatever ground and qualification, is entitled to the inheritance and he shall exclude the remote who is on the same ground and qualification entitled to inheritance. Thus, the mother excludes the grandmother, the daughter excludes the grand-daughter and the real sister excludes the stepsister. As the qualifications and grounds on the basis of which the entitlement to inheritance is created is common between them, their closer relationship with the deceased shall be relied upon.

If both the heirs—the excluder and the excluded are the *'Asbat* (Residuary) as well, regard shall be had of their closeness of relationship on the principle of 'closer excludes the remote' and no regard shall be had of the unity of the ground and qualification for their entitlement to inheritance. But the heirs who are merely *Sahib al Farq* (Sharers) in their being 'closer' or 'remote' regard of the unity of the ground and qualification of inheritance shall also be had, such as the regard is had of the qualification of ascendancy and descendancy on the point of priority between the father and the grandfather.

3. *Excluder's relationship with the deceased being stronger than that of the excluded one* : The heir who in relationship with the deceased is

stronger than the excluded one he excludes the one having weaker relationship provided that both belong to the same rank of relationship. Hence the true brother excludes the stepbrother and the true brothers' son (nephew) excludes the stepbrother's son and the true brother of the father excludes the stepbrother of the father and the true sister excludes the stepsister.

As the kinds of "exclusion" i. e. the total exclusion and the partial exclusion by reduction of share are common in these three principles, it is proper that they, the excluder and the excluded one, for the sake of clarity be stated together.

- i. Mother shall exclude the grandmother. Closer grandmother shall exclude the remote grandmother, whether they are from mother's side or from father's side.
- ii. Father shall exclude all forefathers.
- iii. Issues of the deceased shall exclude all the deceased's brothers and sisters as the father excludes all the forefathers.
- iv. Sons and son's son who are higher in rank than the son's daughters shall exclude the son's daughters.
- v. Two lineal daughters of the deceased or two such of its grand-daughters (deceased's son's daughters) who are higher in grade than the other grand-daughter (son's son's daughter) shall exclude such grand-daughter. These two lineal daughters or two true grand-daughters shall also exclude her, provided there is no son to convert the daughters or the grand-daughters into those of *'Asbat* (Residuaries).
- vi. Son or grandson of howsoever low in degree shall exclude the true brother and sister of the deceased as does the father of the deceased excludes them. The sister of the deceased inherits him only when the deceased is *Kalalah*, that is, when the deceased has left no issue, father or mother, as is stated in the Holy Qur'an (Surah IV : 175).
- vii. Consanguine sister of the deceased shall, in the presence of son, grandson, of howsoever low in degree, and the father of the deceased stands excluded; and the true sister when she becomes *'Asbah* with daughters and son's daughters, exclude the consanguine sister.

In the like manner, the three above stated principles shall apply to all the questions of exclusion. Zahiryyah and Shia'h Imamiyyah as well are in agreement with these principles relating to exclusion. Although there is in Shia'h *Fiqh* some difference due to classification of heirs, but there is no basic or fundamental difference on the principle of exclusion.

Modern Legislation :

In the Inheritance Laws of Egypt (Sections 23-29), of Syria (Section 122-43) and of Morocco (Section 252-56) the principles of *Hajab* and *Hirmān*, total as well as partial exclusion, have been codified in accordance with the traditional Sunni Law. (For detail see author's *Majmu'ah Qawanin Islam*, Vol. v, pp. 1948-55).

Section 327. In the event of death of grandfather and in the presence of his own son, the issues of his other grandfather by the deceased son or daughter (who is dead in his issues of his pre-deceased son or daughter lifetime) shall not be entitled to get inheritance in the estate left by the grandfather as representatives of their deceased father or mother, which he or she would have received, if alive.

(2) The son and daughter of the pre-deceased son of the deceased grandfather may, however, get their inheritance, subject to the provisions of law contained herein this Code.

COMMENTARY

In any discussion about the Muslim Law of Inheritance in modern times, the question of "exclusion and deprivation" from heirship of orphan grand children of the deceased has gained added, indeed exclusive, importance. The irony is that on this particular question there has been complete consensus of every school of *fiqh* from the times of the Prophet (Sallallahu 'alaihi wa Sallam) till very recently. The unanimous view is that an orphan grandchild does not inherit from the deceased grandparents (maternal or paternal) and this view is shared by all the well-known Sunni Schools, the Imamiyah, the Zahiris, the Zaidia and the lesser known and even obscure and stray schools of thought. The only exception to this rule among the Sunni Schools is that if the deceased leaves a single daughter, but no sons alive, the orphan grand-children share the half, left over from the half inherited by the daughter, according to the rule that a female gets half of a male's share. Or

if there is one son's daughter she gets one sixth alongwith the daughter and the rest is shared by the residuaries ('*asbār*'). The Shi'ah Imamiyah, however, stick to the rule of exclusion of the orphan grandchildren and award the whole property to the daughter on the ground of proximity in the aforesaid case.

Modern Legislation :

Anyway, there is consensus of the *Ummah* on the question that if the deceased leaves behind a son and a daughter and the issues of his deceased son or daughter, the entire estate shall go to the son and the daughter and the predeceased son's son and daughter and the predeceased daughter's son and daughter shall not be the heirs. But nowadays special laws in several Muslim countries have been enacted concerning the children of the predeceased son (or daughter) of the deceased. Thus, under the Egyptian Law of *Al-Wasiyya*, 1946, Sections 76, 77 and 78, it has been laid down that the son's son and daughter and the daughter's son and daughter (whose parents had died during the life-time of the deceased) irrespective of the fact that other son or daughter of the deceased are alive, shall be entitled to get that share in the estate left by the deceased which their dead parents (father or mother) might have got, had they been alive. It has, however, been provided that the said share in case of being in excess to one-third of the entire estate is reduced to one-third of the entire estate so that it may not exceed the fixed limit of a Will i.e. the one-third. It has further been made essential that in such a case, the said issues of the predeceased son or daughter should not have received that quantum from the deceased through a gift or through voluntary Will made by the grandfather in their favour.

The same rule has been adopted under the Syrian Law of 1953. Tunisia in 1957 and Morocco in 1958 have also enacted laws in consonance with the same rule. But under the Syrian and Moroccan Laws the application of this rule has been limited only to the sons and daughters of the predeceased son of the deceased. That is to say, there it is not applied in case of issues of the predeceased daughter of the deceased.

Pakistan Law :

As against this, under section 4 of Pakistan Family Laws Ordinance of 1961 the orphan grandson and grand-daughter as substitutes of their father and mother have been held to be the heirs. The Section reads as under :

Section 4. "In the event of death of any son or daughter of the *propositus* before the opening of the succession of the children of such son or daughter, if any, living at the time succession opens, shall *per stripes* receive a share equivalent to the share which such son or daughter, as the case may be, would have received, if alive."

In tracing the history of Pakistan legislation on this question, one is reminded of a Bill to the effect that in the presence of a son the orphan grandson and in the presence of a brother, the orphan nephew be entitled to inheritance, was moved for the first time in the Punjab Assembly on 3rd December, 1953. Due to the country-wide opposition the Bill was, however, not passed by the Punjab Assembly. In 1955, the Government of Pakistan had set up a "Family Law Commission" which submitted its recommendations in or about a year's time but again due to heavy opposition of the 'Ulama the Government could not dare to implement those recommendations. But then through the Presidential Proclamation of October, 1958 the Constitution of 1956 was abrogated. The Central and Provincial Legislative Assemblies were dissolved and Martial Law was imposed in the country. The Martial Law Regime then enforced Muslim Family Laws Ordinance with effect from 15th July, 1961. Section 4 of the said Ordinance provides that if a person dies and leaves behind issues of such of his sons and daughters who are dead in his life-time, the issues of these deceased sons and daughters shall be entitled to inherit the shares that their father or the mother would have inherited had they been alive at the time of death of that person. Thus in Pakistan, as against the law in force in some other Muslim countries purporting to operate within the ambit of a 'Compulsory Will', paternal grandson, paternal grand-daughter, maternal grandsons and maternal grand-daughters have been held to be the heirs as substitutes of their deceased father and mother.

Justice Nurul Arifeen, as he then was, in the case of *Abbas vs. Asmat Mustafa* (PLD 1968 Karachi, 480), discussing the application of Section 4 of Family Laws Ordinance, 1961 has held that Section 4 of the said Law shall apply to those sons and daughters who may have died either before or after the said Ordinance was put into force. The only condition in the said Section is that death must have occurred prior to the opening up of succession. Justice Nurul Arifeen has, in his judgement, further held that if the application of the said Section is kept limited only to those deaths that have occurred after the said Ordinance has been put into force, its application shall not be in accord with the objective of the said Law. The object of the

Ordinance is to ameliorate the distresses of those unfortunate children whose father and mother are snatched away by death in the life-time of their grandfather.

In Pakistan there has been from the very beginning two points of view about the said law being or not being in accord with the Shari'ah of Islam. The over-whelming majority of the people including the Ulama (with the exception of very few) are of the view that the said provision is contrary to Islamic Law; whereas a small group of the modernists holds it to be in accord with Islamic Law. I hold that Qur'anic injunctions, Prophet's traditions and the verdicts of the Companions and practice of the 'Ummah easily establish the conclusion that Section 4 of the Family Laws Ordinance VIII of 1961 is contrary to the injunctions of Islam.

This view of the author was earlier expressed in his Urdu work "*Majmu'ah Qawanin-i-Islam*", (Vol. V, pp. 1955-80) and also in his another work "Islamization of Pakistan Law", which were relied upon by the Shari'at Bench of the Peshawar High Court in its judgement in Shari'at petition No. 3 of 1979, *Ms. Farishta versus Federation of Pakistan*. The learned Shari'at Bench headed by the Chief Justice, (Mr. Justice Abdul Hakim Khan), who wrote the judgement (Khurshid Ahmad and Karimullah Durrani JJ. concurring), held that Section 4 of the Muslim Family Laws Ordinance was against the Injunctions of Islam and it stood repealed from the day of the pronouncement of judgement i.e. 1st October, 1979, as amended by Constitution (Amendment) Ordinance 3 of 1979. Article 203 (b) of the Constitution of Islamic Republic of Pakistan, 1973. The Judgement is currently under appeal before the Supreme Court.

Reasoning from Qur'an :

Thus runs the verse of Sura Nisa on inheritance :

"Allah directs you as regards your children's (Inheritance) to the male, a portion equal to that of two females" (IV : 11).

The word "*awlād*" used in the above verse is the plural of *Walad* and is derived from "*Waldun*" the meaning of which is "to beget; *Walad*, like "*Maflūq*" the objective case from *Falaq* is in the meaning of *Maulud*, begotten. The male (son) and female (daughter) both are included in its meaning because both are begotten. But the meaning of *Walad* is used in two senses :

- (a) Real-one begotten without intermediary, as son or daughter.
- (b) Metaphorical - one begotten with intermediary as grandson, grand-daughter; grandson's son, grandson's daughter etc., who are the issues of sons.

The issues of daughter, daughter's daughter and daughter's son are not included in its meaning in as much as the lineage is established from the father's side. The issues of a son are like the father's own issues; and the issues of a daughter belong in lineage to their own father and grandfather; they do not so belong to their maternal grandfather. They are merely relatives, *Dhawi-al-arhām*. This fact is not merely customary; rather it is established from the Qur'an as well. Therefore it is established that the deceased's own issues without intermediary are included in the real meaning of "*Walad*" and therein the grandson and grand-daughter are included in its metaphorical meaning. The daughter's son and daughter's daughter are not included in the definition of "*Walad*" even metaphorically.

There is a fixed rule in the Arabic language for distinguishing between the real and metaphorical meaning of a word. The same rule is in practice in other languages as well. The rule is that the meaning which cannot be expressed except by that word, the same word is the real meaning of that word. The another meaning which can be substituted or another word in its place can as well be used, is the metaphorical meaning or sense of that word. For instance, the real meaning of '*Asad*' is 'Lion'. For the meaning of 'Lion' another word except '*Asad*' cannot be substituted. Hence the real meaning of the word '*Asad*' is 'Lion'. The metaphorical meaning of '*Asad*' is strong or courageous. There are other words "*Shujā*" or "*Jari*" in the meaning of strong, or courageous. This shows that instead of 'strong' or 'courageous' the word *Qawi* or *Jari* or *Shujā* may be used. Hence the application of the word '*Asad*' in the meaning of strong or courageous is merely metaphorical. There is another rule of rhetoric and a principle of interpretation of 'Statutes' which is current in other languages and systems of law as well. This rule lays down that under the same conditions and circumstances that same word cannot be taken to carry both the real and metaphorical sense at the same time. When a person says: "I saw a lion", it would either mean a beast (real) or a brave man (metaphorical), but it shall give only one meaning at one time. For words which give both the real and metaphorical meanings (according to different circumstances) there is a general rule as to when such word would give the real meaning and when it would convey metaphorical meaning. Generally a word gives the real meaning, but in cases where no real meaning is assigned to that word, or it is not possible to accept its real meaning, or that there is some thing in the context on account of which its real meaning cannot be taken, only then it shall be taken in its metaphorical meaning, inasmuch as initially it is the

real meaning for which a word is coined and meant in the language. Hence, unless the real meaning is nonexistent or forbidden or impossible the metaphorical meaning shall not be taken as meant. According to the aforesaid rules three things get established :—

- (1) The real meaning of the word *walad* (issue) is 'son and daughter', and its metaphorical meaning is son's son, son's daughter, son's son's son, son's son's daughter, howsoever low in degree they may be.
- (2) Real and metaphorical meaning both cannot be taken at one and the same time and in the same context. For, the word *walad* (issue) cannot give the meaning, "son and daughter" as well as "grandson and granddaughter", at the same time and in the same circumstance. That is why, in the presence of the son, his issues i.e. the grandson and the granddaughter do not receive any inheritance. It is not possible that the word "*walad*" (offspring, issue) would in the presence of the "real meaning" also give the "metaphorical meaning".
- (3) As long as the "real meaning" of a word exists, it is not valid to take it in the 'metaphorical meaning'. That is to say, in the presence of the real meaning of the word "offspring" (son and daughter) shall exclude the grandson, granddaughter, being the metaphorical meaning of the word *awlād*.

Hence the meaning of the verse (IV : 11) is that the grandson and granddaughter, in the presence of son and daughter, shall have no right whether the grandson and the granddaughter are the children of the living or dead son.

Imam Jassas has written in his famous commentary of the Holy Qur'an known as *Ahkām al-Qur'an* (vol. 11, p. 96). "There is no difference among the learned ones of *Ummah* that *Sulbi* (true) issues are meant from the bidding of *Aliah*, in the verse (IV : 11), neither is there any difference in that the grandson in this verse is *not* included with *Sulbi Awlad*, nor is there any difference in that the issues of a son are meant when there is no *Sulbi Awlad* and when there is no "*Sulbi Awlad*" it includes the son's issues."⁴

⁴ Al-Jassas : *Ahkām al-Qur'ān*, vol. ii, p. 196 :

”ولم يختلف اهل العلم في ان المراد بقوله تعالى يوصيكم الله في اولادكم اولاد الصلب وانه اذا لم يكن ولد الصلب فالمراد اولاد البنين دون اولاد البنات فقد انتظم اللفظ اولاد الصلب و اولاد الابن اذا لم يكن ولد الصلب“.

Thus, the meaning of the said verse according to the entire 'Ummah unanimously is that *Awlad* means only the son and the daughter. If there is no son and daughter, it shall mean the son's son and the son's daughter howsoever low in degree. The son's son, in the presence of the son, cannot be included in the word "*Walad*".

In the aforesaid verse (IV : 11) the share of the son and the daughter has been stated. In case of there being no son and daughter the share of the son's son and the son's daughter has been specified, provided both male and female heirs are there, i.e. there are a son as well as a daughter. In case there are only the females i.e. only the daughters, or only one daughter, it has been provided for in the other part of the verse, "If they (*Awlad*) are two or more females for them the inheritance is two-third ($2/3$); if the *Awlad* is one female for her the inheritance is half ($1/2$). If the female issues, in accordance with the real meaning of the word *Awlad*, are real daughters they are the heirs and their shares are fixed. If the female issues in accordance with the real meaning do not exist i.e. there is no daughter, rather there are only the son's daughters, they shall, like the daughters, be entitled to inherit in the metaphorical sense. In case of there being only one son's daughter she shall be entitled to half ($1/2$), and in case of there being two or more, they shall share in two-third ($2/3$) of the estate. If, however, there be one daughter and several son's daughters the word "*Awlad*" shall correctly connote the daughter i.e. the daughter shall get half ($1/2$) the fixed share for her. But, it should be noted that in the presence of more than one daughter, their share is fixed at two third ($2/3$) and in the present case after the daughter inherits half the son's daughter (granddaughter) shall get one-sixth ($1/6$). Hence after giving to daughter her fixed share the meaning of *awlad* shall get exhausted and its metaphorical meaning shall then operate to include the granddaughter. Thus it is that after giving the one-sixth share to the granddaughter the Qur'anic command regarding the awarding of two-third estate to females can be truly complied with. In other words, in the first instance the entitlement to half ($1/2$) of the daughter is under the real meaning, in the second instance the complete disposal of two-third ($2/3$) estate is mandatory. When the real meaning of "*awlad*" has been complied with, the metaphorical meaning comes into operation and the granddaughters, whether they be one or several shall get the rest one-sixth ($1/6$) share in the estate.

There is, however, a difference between the inheritance of grandson and the granddaughter. The grandson gets nothing with the son although

after a daughter, getting one-third ($1/3$) he, alongwith the son's daughter, shall get the remainder, if any, after the satisfaction of the shares of other *Dhawi-al-Furud*, for in that case he will be the residuary. The reason is that the total share of the female issues is mandatory at half ($1/2$) for one and for two or more of them it is two-third ($2/3$). Thus the term "*Awlad*" shall include the granddaughter—a figurative reference only, after the real meaning has been exhausted. But it is not so in the case of a son and grandson. For, in case of inheritance of sons, no mandatory share has to be exhausted. The sons inherit all the property left by the sharers and the real meaning of the "*awlad*" exhausts the whole estate. Therefore, no ground is left for the assignment of other meaning to the word *awlad*. This is also because no word can be assigned its literal as well as metaphorical meaning, at the same time, violating principles of *fiqh* as well as grammar.

In Sura Nisa (IV : 33) it is stated : "To (benefit) everyone, we have appointed shares and heirs to property left by parents and relatives (*Aqrabūn*)". It is narrated from Hadrat Ibn Abbas that the "*Mawālī*" used in the verse are "*Asbat*" (residuaries) and this is more correct.⁵

Imam Jassas, in the Commentary, *Ahkam Al-Qur'ān*, (Vol. II p. 223) says that reports of Hadrat Ibn Abbas, Hadrat Mujahid and Hadrat Qatada are that "*Mawālī*" herein mean "*Asbat*" (residuaries). Imam Jassas has, in support of this interpretation, quoted a tradition that the Prophet (Sallallahu 'alaihi Wa Sallam) said, "A person who dies and leaves behind him property, his property is for the "*Mawālī*" i.e. '*Asbat*'."

The word "*Aqrabun*" in the abovesaid verse (IV : 33) is the plurul of the word "*Aqrab*" and is a superlative derived from the word "*Qurb*". It means "close". Hence here "*Asbāt*" shall be the heirs who are closest to the deceased. Being "closer" means closer in relationship. The closeness in relationship are of three kinds :

1. There is no intermediary in between father and son; or is lesser number of intermediaries in between the deceased and the grandson compared to great-grandson (son's son's son).
2. If they are of the same degree, the relationship of one is closer than that of the other, as real brother is closer in relationship

⁵Al-Suyuti, Jalaluddin (d. 911 A.H.) : *Al-Jalalayn*, Cairo, 1358 A.H., p. 172 (on margin of *Al-Baiḍāwī*).

than the consanguine brother; the mother and father both are common in "real" relationship whereas in consanguine only the father is common.

3. If the two are of equal degree, the relationship of the one should be nearer, as of the son and father, though both of them are close to the deceased without any intermediary, the son is nearer to the deceased whereas the father is not. Hence the son is "closer".

In the previously quoted verse (IV : 11) the share of female issues has been fixed as described above. The said verse has also been described of the other sharers (*Dhawi al-Furūd*). The Qur'ānic verse (IV : 7) lays down that "from what is left by parent and those nearest related there is a share for men" i.e. the remoter ones shall stand excluded. The verse covers the case of all "*Asbāt*" and it also clarifies that after the *Dhawi al-Furūd*, the basis of being heir, is closer relationship. That is to say, the closer one has preference over the remoter one. Besides, the said verse is also authority for the rule that the son whose share in the estate of his father is not fixed is '*Asbah*' or if the son and the daughter both together are there, then the share of daughter does not remain a fixed one. The daughter too, along with her brother becomes an '*Asbah*' (residuary). Now the closer among *asbat* is the heir. If both of them are present, the sons and daughters, male shall get twice of what the female shall get, but if both are sons, they shall get equal shares. If the heir is the sole son and no *Dhu-furūd* is there he shall be the heir of the entire estate. If he is the grandson (the son of other deceased son) he is remoter than the son and so in the presence of the son he shall not be the heir. The great-grandson as well, compared to grandson, being remoter shall not be the heir in presence of the grandson, when there is no son. Likewise the brother is closer. Hence the nephew (brother's son) in presence of the brother shall not be the heir. Thus to hold the grandson as heir in presence of the son and holding nephew as heir in presence of brother is against the Qur'anic verse and the traditions of the Prophet which will be discussed later.

This question may be dealt with in another manner. The Qur'an approves the principle of "Nearer excludes the remote", which is proved by the word "*Aqrabun*" in the verse (IV : 7). The word "*Aqrabun*" does not refer to the general relatives of the deceased, rather it means only those relatives who are closer to the deceased. In the following verse (IV : 8) it is said, "But if, at the time of division other relatives or orphans, or poor, are

present, feed them out of the (property), and speak to them words of kindness and justice". Thus the words "*Ululqurbā*" (those related) cannot be equated in meaning with "*Aqrabun*" inheriting relations, who are closer to the deceased. If that be not so, they will inherit alongwith those indicated by the word, "*Aqrabun*". But the verse has clearly bracketed, "*Ululqurbā*" not with "*al-Aqrabun*" but with orphan and those in need, and urges that "they be fed and given something and talked to in the usual manner fit for the occasion". Clearly this is not mandatory division of estate among the latter too, but simply recommendation for observing good (manner). This use of the word "*Ululqurba*", as distinct from "*al-Aqrabun*" clearly brings out the fact that by the word "*Aqrabun*" from the beginning, only those relatives are meant between whom and the deceased there is no intermediary, and from the other word "*Ululqurba*" those relatives are meant between whom and the deceased there is some intermediary. Hence in view of these two different expressions used in the Holy Qur'ān there is hardly any rational ground to include a member of one category among those of the other category i.e. one of the *Ululqurba* among the *Aqrabūn*. If the *Ṣulbi* son and the son of the other deceased son of the deceased, (grandson) both are there, the son is closer to the deceased and the grandson compared to him is remoter from the deceased. This is similar to where the father and grandfather of the deceased both being alive, the father is closer to the deceased and the grandfather compared to him is remoter from the deceased. Therefore the son shall be of the "*Aqrabun*" while the grandson shall be of "*Ululqurba*" the grandson as against the son shall not be entitled to inheritance. But certainly alongwith other "*Ululqurbā*" good treatment and family consideration extended to him shall stand approved by God and shall be considered by him as praiseworthy.

Here it seems necessary to make it clear that keeping in view all the relevant verses and the nature and occasion of their revelation it stands proved that Islam does not hold that 'poverty, need and helplessness' of the relatives of the deceased as the basis of the settlement of shares in the estate. Had it been so, it would not have been said: "Ye know not whether your parents or your children are nearest to you in benefit. These are settled portions ordained by Allah and Allāh is all Knowing, All Wise". (IV : 11). This verse clearly proves that in the indication of the heirs and their shares, the economic conditions or their being needy and helpless has not been made the basis of doing so. Had it been so, it would not have been said "for the male it is twice that of the female"; rather it would have been "for the female

it is twice that of the male.” “It may be said that a female as against a male is in greater need of property and due to her being comparatively needy and because of femineity she should have been held to be better entitled to property. Likewise a husband in the event of his wife having no issue, has been held entitled to half of his wife’s estate, whereas the wife, in the event of having no issues, has been held entitled to only one-fourth of her husband’s estate though the need, helplessness, incapability of earning livelihood and the absence of required strength to so earn might demand that one-fourth of the estate ought to have gone to the husband and the half to the wife. Hence, from these revelations it is established that so far as inheritance is concerned, being needy and helpless have not been the criteria; rather this consideration comes in the last, as is clear from the verse “But if at the time of division other relations or orphans or poor, are present, feed them out of the (property) and speak to them the words of kindness and justice (IV : 8).” It thus becomes clear that God holding these heirs as benefactors of the deceased is Himself passing the order not that the deceased be held under obligation to give benefit to the heirs. It is evident that the son compared to grandson is a greater benefactor as is the father compared to grandfather. Allamah Qurtubi has in his Commentary on the Holy Qur’an, *Jami’ al-Aḥkam al-Qurān* stated “Our Ulama have said that in the verses prescribing inheritance three principles seem to be well established. Firstly, the inheritance has been firmly based on the relationship; secondly, the relationship is graded on nearness, and thirdly, the comprehensiveness of the fixed shares that have been elaborately stated in the said verses”.

Another famous Commentator of the Holy Qur’an, Allamah ‘Alāuddin (d. 725 A.H.) in his Commentary known as “*Tafsir al-Khazan*” having cited the incident of the wife of Hadrat Aws b. Ṣāmit, commenting on the verse has said, “when at the time of division of estate (the heirs have been addressed) such relatives, be present who cannot be the heirs, and the poor and needy persons are present as well, they may be given something (each) from the estate. In this part of verse the ‘*Ululqurba*’ have been given preference over the “*Yatama*” and *Yatama* over the “*Masakin*” because of the “*ululqurba*” being closer in relationship. The *Yatama* and *Masakin* being weaker and extremely needy, they too be given away something from the property out of charitable motive.”

Thus from the writings of these commentators of the Holy Qur’an, it is clear that from the verse, (IV : 8) only those relatives are meant

who are related to the deceased but cannot be the heirs of the deceased as against the *Aqrabūn*” who being closer in relationship become real heirs. The “*Ululqurba*” are purposely included in the list with “*Yatama* and *Masakin*”. The difference, however, is that due to their being relatives of the deceased (though distant) they get preference over both the *Yatama* and *Masakin*. From this discussion as well, one may easily come to the conclusion that the grandson, in presence of the son, is in the category of “*Ululqurbā*” which conforms to the verse IV : 8.

Prophet's traditions and verdicts of the companions :

The *Sahihayn* of Al-Bukhari and Al-Muslim, *Sunan* of Abu Da'ud, *Jāmi'* of Tirmizi and other collections of *Ahadith* report from Hadrat Abdullah b. Abbas that the Prophet (Sallallahu 'alaihi Wa Sallam) said, “give the fixed shares in inheritance to the sharers whereafter whatever is left over is for the nearest male related to the deceased.”⁶ It is established from this tradition that the man who is entitled to inherit personally or through a male related to the deceased is “*Asbah*”. His share is not fixed and settled by the Qur'an. Son, grandson, brother, uncle and their male issues are “*Asbat*” whose shares are not fixed. Thus, from amongst them, whoever is closer to the deceased becomes the heir. The son compared to grandson and the brother compared to the nephew are closer; hence the son and the brother shall exclude the grandson and the nephew.

The famous commentator of *Sahih al-Bukhari*, Allama Ibn Hajr al-'Asqalani writes, in *Fath al-Bari* (vol. XII, p. 10) “there is unanimity of *Ummah* on the point that whatever remains after the distribution of shares of the sharers, the same shall belong to the closest '*Asbah*'. The closest '*Asbah* shall get precedence. Thereafter precedence shall be given to the next closest '*Asbah*. A remote *Asbah* shall not be an heir in the presence of a close '*Asbah*. An '*Asbah* is that male who is so related to the deceased that there is no female intervening between him and the deceased. If he is alone, he shall get the entire property, which is left over by the sharers. If there is no sharer the closest '*Asbah* gets the whole.”⁷ The commentator of *Sahih*

⁶Imam Bukhari (d. 204 A.H.) : *Ṣaḥīḥ*, Karachi, vol. ii, p. 997 :
 “عن ابن عباس قال قال رسول الله صلى الله عليه وسلم الحقوق الفرائض باهلها فما

بقي فلاولى رجل ذكر”-

اجمعوا على ان الذى يبقى بعد الفروض للعصبة يقدم الاقرب فالاقرب فلا يرث
 عاصب بميد مع عاصب قريب والعصبة كل ذكر يدلى بنفسه بالقرابة ليس بينه وبين
 الميت انشئ فمضى انفراد اخذ جميع المال”-

al-Muslim, Imam Nawawi also writes, "There is an unanimity of all Muslims on the point that whatever is left after giving of (their shares to) the fixed sharers, belongs to the '*Asbah*'. The closest of them shall get precedence, and the close next shall succeed thereafter. Hence the "remoter '*Asbah*'" shall not be the heir in presence of the "closer '*Asbah*'".⁸

It is also clearly reported in *Sahih al-Bukhari*, (vol. ii, p. 997) "Hadrat Zaid b. Thabit says: The grandson shall not be an heir (along) with the son".⁹ Another well-known commentator of *Sahih al-Bukhari*, Allama Badruddin 'Aini also says, in "*Umdatul Qari*, (vol. xi, p. 97) "Whatever Hadrat Zaid has said there is consensus on it."¹⁰

Hadrat Rabi' b. Sabih has reported from Hadrat Ata: "Hadrat Abu Bakar says that if the father of the deceased is not present, the grandfather of the deceased shall take the place of the father of the deceased, in the same way as the grandson of the deceased, in the event of the son of the deceased not being present is deemed to be the son of the deceased" (*Al-Sunan al-Kubra*, vol. VI p. 225).¹¹

It is also reported from Hadrat Kharjah ibn Zaid ibn Thabit that "only those principles and meanings in respect of the science of inheritance are reliable that have been received from Zaid b. Thabit and only those commentaries (on such principles and meanings) are reliable that are based on the interpretations of Hadrat Zaid from Abu Al-Zin'ad." (*ibid.*, p. 229).

This last report continues to say that Zaid b. Thabit said: "The status of the issues of the sons of the deceased son, in the absence of a son of the deceased, (himself) shall be that of the deceased. Of them the males shall be like his real male issues and females shall have the status of *sulbi* issues. As were they (the issues of the deceased) the heirs, so shall these (the issues of the deceased's issue) be the heirs; and as they (the former) prevented or got prevented in the matter of inheritance so shall these (the latter) either prevent or be prevented from inheritance. (where the son and the grandson

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فالاقرب فلا يرث عاصب بعيد مع وجود قريب".

⁹ "قال... ولا يرث واد الابن مع الابن".

¹⁰ "وهذا الذي قاله زيد اجماع".

¹¹ "كان ابو بكر يقول الجد اب المالم يكن دونه اب كما ان ابن الابن ابن المالم
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who are related to the deceased but cannot be the heirs of the deceased as against the *Aqrabūn*” who being closer in relationship become real heirs. The “*Ululqurba*” are purposely included in the list with “*Yatama* and *Masakin*”. The difference, however, is that due to their being relatives of the deceased (though distant) they get preference over both the *Yatama* and *Masakin*. From this discussion as well, one may easily come to the conclusion that the grandson, in presence of the son, is in the category of “*Ululqurbā*” which conforms to the verse IV : 8.

Prophet's traditions and verdicts of the companions :

The *Sahihayn* of Al-Bukhari and Al-Muslim, *Sunan* of Abu Da'ud, *Jāmi'* of Tirmizi and other collections of *Ahadith* report from Hadrat Abdullah b. Abbas that the Prophet (Sallallahu 'alaihi Wa Sallam) said, “give the fixed shares in inheritance to the sharers whereafter whatever is left over is for the nearest male related to the deceased.”⁶ It is established from this tradition that the man who is entitled to inherit personally or through a male related to the deceased is “*Asbah*”. His share is not fixed and settled by the Qur'an. Son, grandson, brother, uncle and their male issues are “*Asbah*” whose shares are not fixed. Thus, from amongst them, whoever is closer to the deceased becomes the heir. The son compared to grandson and the brother compared to the nephew are closer; hence the son and the brother shall exclude the grandson and the nephew.

The famous commentator of *Sahih al-Bukhari*, Allama Ibn Hajr al-'Asqalani writes, in *Fath al-Bari* (vol. XII, p. 10) “there is unanimity of *Ummah* on the point that whatever remains after the distribution of shares of the sharers, the same shall belong to the closest ‘*Asbah*. The closest ‘*Asbah* shall get precedence. Thereafter precedence shall be given to the next closest ‘*Asbah*. A remote *Asbah* shall not be an heir in the presence of a close ‘*Asbah*. An ‘*Asbah* is that male who is so related to the deceased that there is no female intervening between him and the deceased. If he is alone, he shall get the entire property, which is left over by the sharers. If there is no sharer the closest ‘*Asbah* gets the whole.”⁷ The commentator of *Sahih*

⁶Imam Bukhari (d. 204 A.H.) : *Ṣaḥīḥ*, Karachi, vol. ii, p. 997 :

”عن ابن عباس قال قال رسول الله صلى الله عليه وسلم الحقوق الفرائض باهلها فما

بقي فلاولى رجل ذكر“.

اجمعوا على ان الذى يبقى بعد الفروض للعصبة يقدم الاقرب فالاقرب فلا يرث
عاصب بعيد مع عاصب قريب والعصبة كل ذكر يدلى بنفسه بالقرابة ليس بينه وبين
الميت انثى فمضى انفرد اخذ جميع المال“.

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This last report continues to say that Zaid b. Thabit said : "The status of the issues of the sons of the deceased son, in the absence of a son of the deceased, (himself) shall be that of the deceased. Of them the males shall be like his real male issues and females shall have the status of *sulbi* issues. As were they (the issues of the deceased) the heirs, so shall these (the issues of the deceased's issue) be the heirs; and as they (the former) prevented or got prevented in the matter of inheritance so shall these (the latter) either prevent or be prevented from inheritance. (where the son and the grandson

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of the deceased, if found together, the grandson in presence of the son shall not get the inheritance. If the deceased has two or more daughters, the granddaughter shall get nothing, except where along with the granddaughters, the grandsons of the deceased as well be present." (Ibid).

Haḍrat Mughirah has, on his own authority, reported the statements of Hadrat Zaid b. Thabit, Hadrat Ali and Hadrat 'Abdullah ibn Mas'ud to the effect that the issues of the issue of the deceased, in case of there not being a son of the deceased, shall be considered to be the issues of the deceased. If some one, therefore, leaves after his death a son and a grandson, the grandson shall get no inheritance. Similarly if the deceased leaves behind him a grandson, a great-grandson and so on to the lowest (i.e. more distant) degrees, the lower one, in presence of the higher one, shall get nothing as the grandson (in presence of the son gets nothing) (ibid, p. 238). The verdicts of Hadrat Abu Bakr, Zaid b. Thabit, Hadrat 'Ali and Hadrat 'Abdullah b. Mas'ud are clear proof of the fact that during the days of the Companions of the Holy Prophet there was a consensus that in presence of the closer one the remoter one shall not be the heir. Not a single assertion of any of the Companions can be cited against this position.

Opinions of the jurists :

It is abundantly clear from the above-stated Qur'anic verses, the Holy Prophet's traditions and the Companions' verdicts that all the Companions of the Holy Prophet and their Successors, Commentators of the Holy Qur'an and the Traditionists are agreed that after making over the fixed shares to *Dhawi al-Furūd* the principle of 'the nearer is nearer' shall be adhered to. This writer, inspite of much search, has not been able to find any assertion of the Four Imāms (A'immaḥ Araba'ah) or of any other Jurist or Mujtahid that disagrees with the said precept and supports the principle of holding the grandson, in the presence of the son, to be an heir in the legacy left by the grandfather, or adopts on this question the assertion of any other *Jurists* or *Mujtahid* differing. In other words, there is complete consensus of the entire 'Ummah on this question which is being acted upon since last fourteen hundred years. For further illustration and support the viewpoints of various schools of *fiqh* are stated hereunder :

The Hanafi rule of conduct : Imām Al-Sarakhsi (d. 482 A.H.) in his book, *Al-Mabsūt* (vol. XXIX, p. 141) says that "in all matters dealt with by him the issues of the son of the deceased shall be the substitute of the real (*ṣulbi*) issues of the deceased himself, when the latter are not present, because

God says, "Allah directs you in respect of your *awlād*", and the word "*awlād*" (issues) is used for the sons of sons only metaphorically, for instance God says, in the Qur'ān, "*Yā Bani Adam*", "O children of Adam", though at the time of revelation of the verse no *sulbi* issue of Hadrat Adam existed (but from millions of chains there existed innumerable issues of the issues of Adam). Thus Imam Sarakhsi proceeds, "If *sulbi* issues, and the issues of such issues, are somehow found together, and there is a son of the deceased amongst the *sulbi* issues, the grandson and granddaughter of the deceased or any one of the two shall get nothing, in as much as the *sulbi* son being in the meaning of real issues shall be entitled to the entire property. When the real meaning of a word can be ascertained and acted upon, its metaphorical meaning shall be discarded in the same. It would be unwarranted to take a word both in the real and the metaphorical meaning at one and the same time and in the same situation."

An eminent jurist among the Hanafis, "Allamah Ibn Nujaim, the author of *Bahr al-Rā'iq*, has said in his aforesaid book (vol. 8 p. 494) that "the grandson gets excluded in the presence of the son, as the son compared to grandson is closer. Hence the grandson and granddaughter are not heirs in the presence of sons either on the ground of '*Asūbat* (consanguinity) or *Fardiyat* (being a sharer)."

The Māliki rule of conduct : In the book, "*Muwatta'a*" of Imām Mālik, commentary by Al-Zarqāni (vol. III, p. 412) it is written that "the issues of the sons, in the absence of sons, shall be the substitutes of the sons. Hence the males (of them, the grandsons) shall be like the males (of them, the sons) and the females (of them, the granddaughters) like the females (of them, the daughters). As they are the heirs, so are these the heirs. And as they exclude, (the nearer excluding the remoter) so shall these exclude. If the real (*sulbi*) son and the son of the son are found together and the son is entitled to inherit, with him there is no inheritance for the grandson; the grandson shall get nothing".

Allamah Ibn Rushd, too, has said in his book "*Bidayat al-Mujtahid*" (vol. ii, p. 340) that "there is consensus on the point that the issues of the son shall be heirs (only) when there is no son of the deceased".

The Shafi'i rule of conduct : Ibrahim b. Ali Yūsuf Al-Firozabadi al-Shirazi in his book, "*Al-Mohazzab Fil-Fiqh Al-Shafi'i*" (vol. ii, p. 30) writes that "the son and the father, among '*Abāt* (Residuaries) are the closest, because they bodily bear relationship with the deceased and the relationship of other relatives is traced through them both. If the father and the son are both found together, the son shall get precedence, because God has

begun the verse regarding inheritance with the son saying "God, regarding your issues fixes the share for the males twice that of the females", and the Arabs do start (matter) with important ones (first)."

The Hanbali rule of conduct : Ibn Qudāmah Maqdisi Hanbali in his book "*Al-Mughni*" (Vol. vii, p. 20) writes that "those who are closer to the deceased are better entitled to the legacy than those who being remote get excluded, as is the tradition of the Prophet (Sallallahu 'alaihi Wa Sallam) that after being given the shares of *Dhawi al-Furūd* to them, whatever remains is for the male who is closer of the deceased, and close ones (of the deceased) are the sons, thereafter are sons howsoever low in degree and the closer ones exclude the remoter ones." Ibn Qudāmah after mentioning other '*Asbāt* (residuaries) proceeds that "a consensus of opinions has already taken place on (the above) question".

The Zahiriyya rule of conduct : The Imam of Zāhiri *fiqh* Abu Muhammad Ibn Hazm, in his noted book "*Al-Muhalla*" (vol. VI, p. 560) writes "in the presence of the *sulbi* sons of the deceased, the issues of the sons shall not be the heirs".

The Shi'ah Imāmiyah rule of conduct : Shi'ah Imāmiyah as well have not, on this question, differed with the unanimous view of the 'Ummah. Muḥaqqiq Abu Ja'far al-Hilli has accordingly, in his authoritative book, *Sharāi' al-Islam*, (vol. ii, p. 183) written that the first accepted principle is that regard shall be had of the closeness of the heir to the deceased. Hence in the presence of the issues of the deceased there shall be no estate for the issues of the issues whether they are males or females. If the deceased, therefore, has a daughter, the grandson shall get no inheritance. In short, when the issues and the issues of the issues are found together, whoever of them is closer to the deceased shall be the heir and the remoter ones of them shall be excluded from getting the estate.

From the above remarks of Allamah Hilli it is evident that according to Shi'ah Imāmiyah, as the son of the deceased is the cause of depriving the grandson, so is the daughter of the deceased the cause of depriving the grandson, because both (the son and the daughter) in being the issues of the deceased are equal in degree and the two compared to other relatives are closer in relation to the deceased. According to the Imāms and Jurists of Ahl-i-Sunnat, however, only the son of the deceased shall deprive him. As against this, according to Shi'ah view the daughter as well deprives the grandson. The argument of the Ahl-i-Sunnat is that, unlike other *Dhawi al-Furūd*, when the deceased has only a son, the Qur'ān has not fixed any share for him. It is proved from this that if no heir among *Dhawi al-Furūd*

exists and there is only the son of the deceased, he shall be the heir of the entire property. As against this, if there is only a daughter of the deceased the Holy Qur'ān in fixing her share has explained, "If the deceased has only a daughter she shall get the half". This proves that the daughter shall be entitled to only the half of the property. And in the presence of '*Aṣbah*' she shall be entitled to no more than that and the '*Aṣbah*' (residuary) shall be entitled to the remaining half of the estate. Thus in such situation grandsons may also inherit, if there is no son. But the Shi'ahs do not appear to rely on the tradition reported through Ibn Abbas quoted above (Ref. footnote 6 supra).

The Current Pakistan Law and the Modern Point of View :

The verse which may directly be relied upon in support of the modern view taken in Pakistan regarding the legacy for orphan grandson is *يُوصِيكُمُ اللَّهُ فِي* "أولادكم" (IV : 11). It is argued that the real meaning of "*Awlād*" may as well be taken for the orphan grandson because his father is dead and there should be no difference between *ṣulbi* son and the grandson. In support, their contention is that the marriage with the widow or divorcee of grandson is forbidden to his grandfather in the same way as the marriage of the widow or divorcee of son to his father. According to them, therefore, when the grandfather dies the grandson (whose father is dead in the life of the grandfather) is directly the "nearer one" to the grandfather, (in his own right) and not through his living uncle. Undoubtedly he had been connected to his grandfather through his father. But after the death of his father, the argument is, that bar is removed and he becomes directly the "nearer one" to his grandfather. The principle, according to them, is that the grandson directly gets the share from the legacy of his grandfather provided the excluder is not there. If his father is there, he becomes the preventer and excludes him (the grandson of the deceased). Thus, according to them, the Qur'an includes the grandson, great-grandson and all the grandsons to the lowest degree, in the meaning of issues (*Awlad*). It can, therefore, be argued, they say, that the word "*walad*" is common for both the son and the grandson, provided there is no person in their own line barring their succession.

But it is entirely fallacious to rely on the analogy of the wife of the grandson being forbidden to the grandfather (as is the case with the son's wife) to equate the son and son of a deceased son in the matter of inheritance. From the words "*ḥalāl Abnā'ikum*" in the Holy Qur'ān the wives of son, grandson have been forbidden for the father-in-law. It so appears that the words "*Walad*" and "*Ibn*" used here, have been considered by the

modernists to have the same meaning while it is not at all so and the word "*Ibn*" includes in it, at a time, all the issues and the issues of the issues howsoever low. That is to say, it includes the son, the grandson and all of them to the lowest degree as do the words "*Ibn Adam*". But the word "*Walad*" in the verse of inheritance has been used only for the son in its specific and real sense and only metaphorically for the grandson.

To hold the grandson's direct relationship (because of the death of the intermediary) with the grandfather in the same degree and *at pâr* with the relationship of the grandfather and his other sons on the basis that a family tree drawn on paper would also show no intermediary, is a mental obfuscation unworthy of any serious discussion and has no basis in the Holy Qur'ân or Prophet's traditions. Hypothetically if this interpretation of the word "*walad*" is accepted, for the moment, as correct, it shall apply only to the son's son and son's daughter. It can never apply to the daughter's son and daughter's daughter whereas both have been included in the connotation of heirs in the Pakistan Family Laws Ordinance, 1961 (Ordinance No. VIII of 1961).

Then, this unwarranted intrusion in a legal system complete in itself is bound to lead to certain results not only inconsistent with but opposed to *Shari'ah*. For example, if the grandson and the granddaughter are directly considered (along with their living uncle) to be the direct '*Asbah*' to the grandfather, they then, under the rule of "for the male is twice that of the female", should not get their shares to the extent of their deceased father's shares. Though according to the new law the orphan grandsons and grand-daughters (including the maternal grandsons and granddaughters) have been held to be entitled to the shares that their father or the mother (as the case may be) would have got if they were alive. To proceed, if the deceased leaves two daughters alive, when there are also living one or more than one daughter of the deceased son, then after giving two-thirds to the daughters of the deceased, to give the share of the deceased's son to his daughters would directly militate against the Qur'an and the Sunnah.

Under the law in force, the inheritance receivable by son's son and son's daughter and daughter's son and daughter's daughter to the extent of the share of their deceased father or mother is obviously rationalised on a limited principle of "substitution". That is to say, the son's son and son's daughter and daughter's son and daughter's daughter inherit in the capacity of being substitutes of their deceased father or mother, alongwith the living son or daughter of the deceased, as the case may be. This new principle regarding substitution is foreign to "Law of Inheritance" as embodied in the *Shari'ah*. The principle of substitution current among *Shi'ahs* is also not applicable to the deceased son's son

in case of estate left by the grandfather. The heir, according to the Qur'an gets the inheritance in the capacity of being close to the deceased and not being substitute of some other near one. In case of the son's non-existence, his issues and in the non-existence of father, the grandfather and in the non-existence of the mother, the grandmother do not get the inheritance in the capacity of being substitutes of the other close ones; rather they are held entitled to the inheritance because they in the absence of the son, father and mother of the deceased are close to the deceased without intermediary. If the basis of being close of the deceased without intermediary is discarded and the principle of substitution, as in the current law, is adopted, it shall then become incumbent to apply this principle to all other heirs, which will be entirely inconsistent with the Law of Inheritance under the *Shari'at*.

In this connection it may also be relevant to point out that according to the Qur'an only those heirs are entitled to receive inheritance who are alive at the time of the death of the one from whom the inheritance is received. The current law, however, seems to suppose that at the time of death of the grandfather his deceased son was alive, but he also dies immediately and his share is inherited by his sons and daughters. Presuming for a moment the deceased son as alive and considering him to be dead the next is an absurd proposition. Secondly, if the deceased son is considered alive at the time of death of the grandfather but is again considered to be dead, how and under what law the division of his estate could be kept confined to his son and daughter? It is quite possible that the deceased son leaves a widow and other relatives alive as well.

There arises another difficulty if the current law is to be logically acceptable. For instance, a person has two sons. They die in the lifetime of their father. One of them leaves behind him four sons and the other leaves one son. In accordance with the consensus and practice of the 'Ummah (with the exception of Shi'ahs) the five grandsons being equal in status and degree shall equally share the estate left by the grandfather. According to the law in force, however, the four sons of the first son as substitutes of their father shall get half of the estate and the fifth grandson as substitute for his father shall be entitled to get the remaining half. Though in view of the modern interpretation of "*Walad*" this, too, shall be wrong because the grandsons in their relationship are equal in degree. Again, a person leaves behind a daughter, a daughter of his deceased son (granddaughter) and a brother. According to Shari'ah law the daughter, in accordance with the Qur'an shall get half share of the property; the granddaughter in accordance with the tradition of the Prophet, shall get one-sixth (1/6), and the brother too as '*Asbah* in accordance with another tradition shall get the residue. According to current Pakistani law, however, assuming the deceased son alive, his substitute the

granddaughter shall get two-thirds ($2/3$) as the estate of her father, and the deceased's daughter shall get one-third ($1/3$). The reason of all these complications is that the framers of present law kept in view only one aspect of the hardship to grand-children and possessing no complete knowledge of the niceties of the Law of Inheritance have arbitrarily interpreted the Qur'an and the Sunnah. Obviously this law contravenes the provisions of the Qur'an and Sunnah of the Holy Prophet and the consensus of the 'Ummah and practice of 1400 years.

Source of current Pakistani Law :

The preliminary principles of substitution in the current law have in fact been derived from the Roman Law. Under the Roman Law if a person dies without making a will, the estate devolves upon his agnates. Justinian based the Law of Inheritance on blood relationship and divided the heirs into four classes.

According to the Roman Law the heirs in the same degree of relationship get equal shares as in some respect is done under the Shi'ah *Fiqh* also. Thus, under the principle of substitution under Roman Law, if "A" dies and leaves behind him a son 'B' and two grandsons 'C' & 'D' from his other deceased son, 'B' shall get half of the estate and the other half of the estate be divided between C & D on the basis of substitution. Likewise, the brother and the sister, in the absence of the issues of the deceased, shall be entitled to the estate; and the principle of substitution, in the event of death of any brother or sister, would be applicable to the latter's issues also.

Among the Hindus as well, the principle of substitution is acted upon. Thus the grandson is held entitled to the share of the deceased father. But among the Hindus this principle of substitution has no application in case of daughters or daughter's daughters. Further, so far as the orphan grandsons are concerned the principle of substitution has application upto four degrees, not thereafter.

In the undivided Punjab, before the Independence and before the promulgation of West Punjab Muslim Personal Law (Shari'at) Application Act No. 9, 1948, this principle of substitution was in force on the basis of customary law. But, under the Punjab Rehabilitation Scheme Part II, 1949, in spite of West Punjab Muslim Personal Law (Shari'at) Application Act No. 9 of 1948, the orphan grandson, whose father died in the lifetime of orphan's grandfather, was held to be an heir of the agricultural land of the grandfather. In 1953, the same rule under the said Scheme was made applicable to granddaughters as well. Section 4 of the Family Laws Ordinance, 1961 not only reflects the Roman Law, English Law and the Hindu

Law but is a clear adaptation of the repealed customary law of undivided Punjab, which in form resembled the Hindu customs and usages.

Law of obligatory will in Arab countries :

In Egypt, Syria, Tunisia, Morocco and other Arab countries an effort has been made to solve the problem of the exclusion of the orphan son's sons, son's daughters, daughter's sons and daughter's daughters by a provision prescribing an obligatory will in their favour. These countries, however, keeping in view the spirit of Qur'ānic verse IV : 8, but against the verdict of the Companions of the Prophet and jurists in general tried to favour the orphan grandson and others held on the basis of assumption of some of the successors of the Prophet's Companions, such as Ta'us, Hassan Al-Basri, and the view of Imam Abu Muhammad ibn Hazm Al-Zahiri, that the tenet under "إذا حضر" "القسمه اولوا القربى واليتامى والمساكين" is obligatory. These laws enjoin the officials as substitute of the deceased, to act as executors giving shares from the estate through will to orphan son's sons, son's daughters, daughter's sons and daughter's daughters equal to the share of the deceased son or daughter of the grandfather, not exceeding one-third of the estate. But Ta'us, Hasan Al-Basri among the *tabi'in* and Imam ibn Hazm in the matter of obligatory Will have specified neither the orphan son's son, son's daughters, daughter's sons and daughter's daughters, nor have they prescribed the shares of each or all. Besides, in Muslim countries the law of obligatory Will is absolute. No concept of one's necessity or exigency is known to it. It may sometimes defeat the very purpose it intends to carry out.

A Suggestion :

The Shari'at Bench of the Peshawar High Court at the end of its judgement referred to above (PLD 1980 Pesh. 47) while holding Section 4 of the Family Laws Ordinance, 1961 as void, suggested measures to relieve the distress of son or daughter of a predeceased son. It observed :

"It was suggested to us that to meet the situation in which son of a predeceased son may find himself we should advise a recourse to compulsory will as has been provided for by the Egyptian Law but we think that the making of a Will not being a compulsory duty of a muslim we will be importing something into the Shari'at which may be equally indefensible. We should rather like to commend persuasion and suggest that a child of a predeceased son may himself or through his next friend move the District Judge within the local

limits of whose jurisdiction the property or most of the property is situated (of course during the lifetime of his grandfather) that he should be advised to make a will which should ensure to him what he would have got as an heir to his father had his father not died during the lifetime of his own father. The intervention of the District Judge would incidentally remind the grandfather of his duty and give relief to a son/daughter of a predeceased son in most of the cases. In case, however, the grandfather refuses and District Judge feels that due to minority or for other reason such a son/daughter will require maintenance, it should be possible for the State to arrange accordingly."

CHAPTER XL

Transmission (Munasikhab)

Section 328. The transfer of the share to the heirs of an heir, who prior to the division of the estate of his ancestor dies, is called "transmission" (*Munāsakhah*).

Transmission
(Munaskahah)

COMMENTARY

The word *Munasakhah* "Transmission" in the rhythm of "*Mufā'iloh*" is derived from the word "*Naskh*" which means "Transcribing" or "Diverting to a direction." In the terminology of the law of inheritance it means the transmission of the share to the heirs of an heir, who has died prior to the division of the estate of his ancestor.

Its one method is that the shares of the heirs of the first deceased be apportioned and the shares of the heir who is dead before the apportionment, be separately mentioned. But due to its lengthy process the Doctors of *Fiqh* have adopted in the law of inheritance the process of "Transmission", under which after noting down each of the deceased consecutively and taking into account his heirs and the quantity of their shares such a final result should be obtained, wherein total shares of the living heirs that they obtain from one or several ancestors become known in their entirety.

Kinds of Transmission :

There are the following three kinds of transmission :

- (1) That the heirs of the second deceased must be the same who are the heirs of the first deceased, and they being of the same species no change gets effected in the division of their shares. That is to say, the method of the division among the heirs of the first deceased shall also be the method of division among the heirs of the second deceased. In such event the division of the entire estate at a time shall be enough. For instance, a woman Jamila leaves behind as her heirs two sons Naseem and Shameem and two daughters Bushra and Ayesha. Prior to the division of the estate Ayesha dies and leaves behind as her heirs the said two brothers and one sister. In such situation

the heirs of the second deceased are the same whereas the heirs of the first deceased and the method of division among the heirs of the second deceased is the same as is the method of the division among the heirs of the first deceased i. e. "لذكر مثل حظ الأنثيين" twice for the male that of a female.

Thus there is no gain in dividing at first the estate of the first deceased among heirs and then dividing among the heirs the shares of the second deceased that (she) has received from the estate of the first deceased. This process is unnecessary; rather at the very first instance the estate of the first deceased (excepting that of the second deceased) should be divided among the heirs as the heirs of the second deceased are exactly the heirs of the first deceased the same persons shall be the heirs of the second deceased who are the heirs of the first deceased.

- (2) But if the method of division is different, in that event, the one division shall not be enough. For instance a person named Maqsd dies. He leaves as his heirs a son Nasir from one wife and leaves three daughters Amina, Rabia and Shama from another wife. Out of these, a daughter Amina dies before the estate is divided. She leaves as her heirs the two real sisters Rabi'a and Shama and one step brother Nasir. In the circumstance, the method of division applied in the case of heirs Rabi'a, Shama and Nasir of the first deceased i. e. the method "لذكر مثل حظ الأنثيين" does not remain applicable to the case of the heirs of the second deceased; rather the two-third of the estate shall belong to the real (full) sisters and the remaining shall belong to the step brother.

- (3) The third kind is that the heirs of the second deceased are besides the heirs of the first deceased and in the method of division also there is a change. For instance, the ancestor leaves behind two sons and two daughters. One son dies before the estate is divided and leaves behind him as his heirs his widow and one son. In this case as well the first division shall not be enough.

In short, the heirs of the second deceased shall either be the same who are the heirs of the first deceased as well, there being no new heirs or besides the heirs of the first deceased there shall be other heirs. In the first case either some change has taken place or has not taken place. If no change has taken place, one division shall be enough. If a change in the

division has taken place or the heirs of the second deceased are besides the heirs of the first deceased, in both these cases the following rule shall be acted upon :

The shares of the heirs of the first deceased are at first settled. Thereafter the heir who, out of them, has died the shares of his heirs settled. The share of the dead heir is divided among his heirs in accordance with their shares. Likewise, if the third death occurs and thereafter the inheritance is divided, therein also the same method is adopted. That is to say, the share of the deceased being divided thereafter among his living heirs, the total share of each of the heirs will be easily found out.

(تمت بالخیر)



APPENDIX I
THE
CHILD MARRIAGE RESTRAINT ACT, 1929
(XIX OF 1929)

[1st October 1929]

An Act to restrain the solemnisation of child marriages

Whereas it is expedient to restrain the solemnisation of child marriages; It is hereby enacted as follows :—

1. *Short title, extent and commencement.*—(1) This Act may be called the Child Marriage Restraint Act, 1929.

(2) It extends to the whole of Pakistan and applies to all citizens of Pakistan wherever they may be.

(3) It shall come into force on the 1st day of April 1930.

2. *Definitions.*—In this Act, unless there is anything repugnant in the subject or context,—

- (a) “child” means a person who, if a male, is under eighteen years of age, and if a female, is under sixteen years of age;
- (b) “child marriage” means a marriage to which either of the contracting parties is a child;
- (c) “contracting party” to a marriage means either of the parties whose marriage is or is about to be thereby solemnised;
- (d) “minor” means a person of either sex who is under eighteen years of age;
- (e) “Union Council” means the Union Council or the Town or Union Committee constituted under the Basic Democracies Order (P. O. No. 18 of 1959) within whose jurisdiction a child marriage is or is about to be solemnised.

3. [Omitted by the Muslim Family Laws Ordinance, 1961 (VIII of 1961)].

4. *Punishment for male adult above eighteen years of age marrying a child.*—Whoever, being a male above eighteen years of age, contracts a child marriage shall be punishable with simple imprisonment which may extend to one month, or with fine which may extend to thousand rupees, or with both.

5. *Punishment for solemnising a child marriage.*—Whoever performs, conducts or directs any child marriage shall be punishable with simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees, or with both, unless he proves that he had reason to believe that the marriage was not a child marriage.

6. *Punishment for parent or guardian concerned in a child marriage.*—(1) Where a minor contracts a child marriage, any person having charge of the minor, whether as parent or guardian or in any other capacity, lawful or unlawful, who does any act to promote the marriage or permits it to be solemnised, or negligently fails to prevent it from being solemnised, shall be punishable with simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees, or with both :

Provided that no woman shall be punishable with imprisonment.

(2) For the purposes of this section, it shall be presumed, unless and until the contrary is proved, that where a minor has contracted a child marriage, the person having charge of such minor has negligently failed to prevent the marriage from being solemnised.

7. *Imprisonment not to be awarded for offences under section 3.*—Notwithstanding anything contained in section 25 of the General Clauses Act, 1897, or section 64 of the Pakistan Penal Code, a Court sentencing an offender under section 3 shall not be competent to direct that, in default of payment of the fine imposed, he shall undergo any term of imprisonment.

8. *Jurisdiction under this Act.*—Notwithstanding anything contained in section 190 of the Code of Criminal Procedure, 1898, no Court other than that of a Magistrate of the first class shall take cognizance of, or try, any offence under this Act.

9. *Mode of taking cognizance of offences.*—No Court shall take cognizance of any offence under this Act except on a complaint made by the Union Council, or if there is no Union Council in the area, by such authority as the Provincial Government may in this behalf prescribe, and such cognizance shall in no case be taken after the expiry of one year from the date on which the offence is alleged to have been committed.

10. *Preliminary inquiries into offences under this Act.*—The Court taking cognizance of an offence under this Act shall, unless it dismisses the com-

plaint under section 203 of the Code of Criminal Procedure, 1898, either itself make an inquiry under section 202 of that Code, or direct a Magistrate of the first class subordinate to it to make such inquiry.

11. [Omitted by the Muslim Family Laws Ordinance, 1961 (VIII of 1961)].

12. *Power to issue injunction prohibiting marriage in contravention of this Act.*—(1) Notwithstanding anything to the contrary contained in this Act, the Court may, if satisfied from information laid before it through a complaint or otherwise that a child marriage in contravention of this Act has been arranged or is about to be solemnised, issue an injunction against any of the persons mentioned in section, 3, 4, 5 and 6 of this Act prohibiting such marriage.

(2) No injunction under subsection (1) shall be issued against any person unless the Court has previously given notice to such person, and has afforded him an opportunity to show cause against the issue of the injunction.

(3) The Court may either on its own motion or on the application of any person aggrieved, rescind or alter any order made under subsection (1).

(4) Where such an application is received, the Court shall afford the applicant an early opportunity of appearing before it either in person or by pleader; and if the Court rejects the application wholly or in part, it shall record in writing its reasons for so doing.

(5) Whoever knowing that an injunction has been issued against him under subsection (1) of this section disobeys such injunction shall be punished with imprisonment of either description for a term which may extend to three months, or with fine which may extend to one thousand rupees, or with both ;

Provided that no woman shall be punishable with imprisonment,

APPENDIX II

THE DISSOLUTION OF MUSLIM MARRIAGES ACT, 1939

(VIII OF 1939)

[17th March 1939]

An Act to consolidate and clarify the provisions of Muslim law relating to suits for dissolution of marriage by women married under Muslim law and to remove doubts as to the effect of the renunciation of Islam by a married Muslim woman on her marriage tie.

Whereas it is expedient to consolidate and clarify the provisions of Muslim law relating to suits for dissolution of marriage by woman married under Muslim law and to remove doubts as to the effect of the renunciation of Islam by a married Muslim woman on her marriage tie; It is hereby enacted as follows :—

1. *Short title and extent.*—(1) This Act may be called the Dissolution of Muslim Marriages Act, 1939.

(2) It extends to all the Provinces and the Capital of the Federation.

2. *Grounds for decree for dissolution of marriage.*—A woman married under Muslim law shall be entitled to obtain a decree for the dissolution of her marriage on any one or more of the following grounds, namely :—

- (i) that the whereabouts of the husband have not been known for a period of four years ;
- (ii) that the husband has neglected or has failed to provide for her maintenance for a period of two years ;
- ¹(ii-a) that the husband has taken an additional wife in contravention of the provisions of the Muslim Family Laws Ordinance, 1961 ;
- (iii) that the husband has been sentenced to imprisonment for a period of seven years or upwards ;
- (iv) that the husband has failed to perform, without reasonable cause, his marital obligations for a period of three years ;

¹Inserted by S 13 of Muslim Family Laws Ordinance, 1961.

- (v) that the husband was impotent at the time of the marriage and continues to be so ;
- (vi) that the husband has been insane for a period of two years or is suffering from leprosy or a virulent venereal disease ;
- (vii) that she, having been given in marriage by her father or other guardian before she attained the age of ¹[sixteen] years, repudiated the marriage before attaining the age of eighteen years ;

Provided that the marriage has not been consummated ;

- (viii) that the husband treats her with cruelty, that is to say,
 - (a) habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical ill-treatment, or
 - (b) associates with women of evil repute or leads an infamous life, or
 - (c) attempts to force her to lead an immoral life, or
 - (d) disposes of her property or prevents her exercising her legal rights over it, or
 - (e) obstructs her in the observance of her religious profession or practice, or
 - (f) if he has more wives than one, does not treat her equitable in accordance with the injunctions of the Qur'ān ;
- (ix) on any other ground which is recognised as valid for the dissolution of marriage under Muslim law :

Provided that—

- (a) no decree shall be passed on ground (iii) until the sentence has become final ;
- (b) a decree passed on ground (i) shall not take effect for a period of six months from the date of such decree, and if the husband appears either in person or through an authorised agent within that period and satisfies the Court that he is prepared to perform his conjugal duties, the Court shall set aside the said decree; and

¹Ibid.

- (c) before passing a decree on ground (v) the Court shall, on application by the husband, make an order requiring the husband to satisfy the Court within a period of one year from the date of such order that he has ceased to be impotent, and if the husband so satisfies the Court within such period, no decree shall be passed on the said ground.

3. *Notice to be served on heirs of the husband when the husband's whereabouts are not known.*—In a suit to which clause (i) of section 2 applies—

- (a) the names and addresses of the persons who would have been the heirs of the husband under Muslim law if he had died on the date of the filing of the plaint shall be stated in the plaint,
- (b) notice of the suit shall be served on such persons, and
- (c) such persons shall have the right to be heard in the suit :

Provided that paternal uncle and brother of the husband, if any, shall be cited as party even if he or they are not heirs.

4. *Effect of conversion to another faith.*—The renunciation of Islam by a married Muslim woman or her conversion to a faith other than Islam shall not by itself operate to dissolve her marriage :

Provided that after such renunciation, or conversion, the woman shall be entitled to obtain a decree for the dissolution of her marriage on any of the grounds mentioned in section 2 :

Provided further that the provisions of this section shall not apply to a woman converted to Islam from some other faith who re-embraces her former faith.

5. *Rights to dower not to be affected.*—Nothing contained in this Act shall affect any right which a married woman may have under Muslim law to her dower or any part thereof on the dissolution of her marriage.

6. *(Repeal of section 5 of Act XXVI of 1937.*—[Repealed by the Repealing and Amending Act, 1942 (XXV of 1942), section 2 and First Schedule.]

APPENDIX III
THE
MUSLIM FAMILY LAWS ORDINANCE, 1961
(VIII OF 1961)

[2nd March 1961].

**An Ordinance to give effect to certain recommendations of the
Commission on Marriage and Family Laws.**

Whereas it is expedient to give effect to certain recommendations of the Commission on Marriage and Family Laws;

Now, therefore, in pursuance of the Proclamation of the seventh day of October 1958, and in exercise of all powers enabling him in that behalf, the President is pleased to make and promulgate the following Ordinance:—

1. Short title, extent, application and commencement.—(1) This Ordinance may be called the Muslim Family Laws Ordinance, 1961.

(2) It extends to the whole of Pakistan, and applies to all Muslim citizens of Pakistan, wherever they may be.

(3) It shall come into force on such date¹ as the Central Government may, by notification in the official Gazette, appoint in this behalf.

2. Definitions.—In this Ordinance, unless there is anything repugnant in the subject or context—

(a) “Arbitration Council” means a body consisting of the Chairman² * * * and a representative of each of the parties to a matter dealt with in this Ordinance³ [:]

⁴[Provided that where any party fails to nominate a representative within the prescribed time, the body formed without such representative shall be the Arbitration Council;]

¹i.e., the 15th day of July, 1961, see Gazette of Pakistan, 1961 Extraordinary, page 1128 a.

²The words “of the Union Council” omitted by the Muslim Family Laws (Amendment) Ordinance, 1961 (21 of 1961), s. 2.

³Substituted *ibid*, for semicolon.

⁴Proviso, added *ibid*,

- ¹[(b) "Chairman" means the Chairman of the Union Council or a person appointed by the Central or a Provincial Government, or by an officer authorized in that behalf by any such Government, to discharge the functions of Chairman under this Ordinance:

Provided that where the Chairman of the Union Council is a non-Muslim, or he himself wishes to make an application to the Arbitration Council, or is, owing to illness or any other reason, unable to discharge the functions of Chairman, the Council shall elect one of its Muslim members as Chairman for the purposes of this Ordinance;]

- (c) "prescribed" means prescribed by rules made under section 11;
- (d) "Union Council" means the Union Council or the Town or Union Committee constituted under the Basic Democracies Order, 1959 (P. O. No. 18 of 1959), and ²[having in the matter jurisdiction as prescribed];
- (e) "Ward" means a ward within a Union or Town as defined in the aforesaid Order.

3. *Ordinance to override other laws, etc.*—(1) The provisions of this Ordinance shall have effect notwithstanding any law, custom or usage, and the registration of Muslim marriages shall take place only in accordance with those provisions.

(2) For the removal of doubt, it is hereby declared that the provisions of the Arbitration Act, 1940 (X of 1940), the Code of Civil Procedure, 1908 (Act V of 1908), and any other law regulating the procedure of Courts shall not apply to any Arbitration Council.

4. *Succession.*—In the event of the death of any son or daughter of the *propositus* before the opening of succession, the children of such son or daughter, if any, living at the time the succession opens, shall *per stirpes* receive a share equivalent to the share which such son or daughter, as the case may be, would have received if alive.

5. *Registration of marriages.*—(1) Every marriage solemnized under Muslim Law shall be registered in accordance with the provisions of this Ordinance.

¹Substituted *ibid.*, for the original clause (b).

²Substituted by the Muslim Family Laws (Amendment) Ordinance, 1961 (21 of 1961), s. 2, for "having jurisdiction in the area concerned".

(2) For the purpose of registration of marriages under this Ordinance, the Union Council shall grant licences to one or more persons, to be called Nikah Registrars, but in no case shall more than one Nikah Registrar be licensed for any one Ward.

(3) Every marriage not solemnized by the Nikah Registrar shall, for the purpose of registration under this Ordinance, be reported to him by the person who has solemnized such marriage.

(4) Whoever contravenes the provisions of sub-section (3) shall be punishable with simple imprisonment for a term which may extend to three months, or with fine which may extend to one thousand rupees, or with both.

(5) The form of *nikahnama*, the registers to be maintained by Nikah Registrars, the records to be preserved by Union Councils, the manner in which marriages shall be registered and copies of *nikahnama* shall be supplied to the parties, and the fees to be charged therefor, shall be such as may be prescribed.

(6) Any person may, on payment of the prescribed fee, if any, inspect at the office of the Union Council the record preserved under sub-section (5), or obtain a copy of any entry therein.

6. *Polygamy*.—(1) No man, during the subsistence of an existing marriage, shall, except with the previous permission in writing of the Arbitration Council, contract another marriage, nor shall any such marriage contracted without such permission be registered under this Ordinance.

(2) An application for permission under subsection (1) shall be submitted to the Chairman in the prescribed manner, together with the prescribed fee, and shall state the reasons for the proposed marriage, and whether the consent of the existing wife or wives has been obtained thereto.

(3) On receipt of the application under subsection (2), the Chairman shall ask the applicant and his existing wife or wives each to nominate a representative, and the Arbitration Council so constituted may, if satisfied that the proposed marriage is necessary and just, grant, subject to such conditions, if any, as may be deemed fit, the permission applied for.

(4) In deciding the application the Arbitration Council shall record its reasons for the decision, and any party may, in the prescribed manner, within the prescribed period, and on payment of the prescribed fee, prefer an application for revision, in the case of West Pakistan, to the Collector and, in the case of East Pakistan, to the Sub-Divisional Officer concerned and his decision shall be final and shall not be called in question in any Court.

(5) Any man who contracts another marriage without the permission of the Arbitration Council shall--

- (a) pay immediately the entire amount of the dower, whether prompt or deferred, due to the existing wife or wives, which amount, if not so paid, shall be recoverable as arrears of land revenue; and
- (b) on conviction upon complaint be punishable with simple imprisonment which may extend to one year, or with fine which may extend to five thousand rupees, or with both.

7. *Talaq*.—(1) Any man who wishes to divorce his wife shall, as soon as may be after the pronouncement of *talaq* in any form whatsoever, give the Chairman notice in writing of his having done so, and shall supply a copy thereof to the wife.

(2) Whoever contravenes the provisions of subsection (1) shall be punishable with simple imprisonment for a term which may extend to one year or with fine which may extend to five thousand rupees or with both.

(3) Save as provided in subsection (5), a *talaq* unless revoked earlier, expressly or otherwise, shall not be effective until the expiration of ninety days from the day on which notice under subsection (1) is delivered to the Chairman.

(4) Within thirty days of the receipt of notice under subsection (1), the Chairman shall constitute an Arbitration Council for the purpose of bringing about a reconciliation between the parties, and the Arbitration Council shall take all steps necessary to bring about such reconciliation.

(5) If the wife be pregnant at the time *talaq* is pronounced, *talaq* shall not be effective until the period mentioned in subsection ¹[(3)] or the pregnancy, whichever be later, ends.

(6) Nothing shall debar a wife whose marriage has been terminated by *talaq* effective under this section from re-marrying the same husband, without an intervening marriage with a third person, unless such termination is for the third time so effective.

8. *Dissolution of marriage otherwise than by talaq*.—Where the right to divorce has been duly delegated to the wife and she wishes to exercise that right, or where any of the parties to a marriage wishes to dissolve the marriage otherwise than by *talaq*, the provisions of section 7 shall, *mutatis mutandis* and so far as applicable, apply.

¹Substituted by the Muslim Family Laws (Second Amendment) Ordinance, 1961 (30 of 1961), S. 2 for "(2)".

9. *Maintenance*.—(1) If any husband fails to maintain his wife adequately, or where there are more wives than one, fails to maintain them equitably, the wife, or all or any of the wives, may in addition to seeking any other legal remedy available apply to the Chairman who shall constitute an Arbitration Council to determine the matter, and the Arbitration Council may issue a certificate specifying the amount which shall be paid as maintenance by the husband.

(2) A husband or wife may, in the prescribed manner, within the prescribed period, and on payment of the prescribed fee, prefer an application for revision of the certificate, in the case of West Pakistan, to the Collector and, in the case of East Pakistan, to the Sub-Divisional Officer concerned and his decision shall be final and shall not be called in question in any Court.

(3) Any amount payable under subsection (1) or (2), if not paid in due time, shall be recoverable as arrears of land revenue.

10. *Dower*.—Where no details about the mode of payment of dower are specified in the *nikahnama*, or the marriage contract, the entire amount of the dower shall be presumed to be payable on demand.

11. *Power to make rules*.—(1) The Provincial Government may make rules to carry into effect the purposes of this Ordinance.

(2) In making rules under this section, the Provincial Government may provide that a breach of any of the rules shall be punishable with simple imprisonment which may extend to one month, or with fine which may extend to two hundred rupees, or with both.

(3) Rules made under this section shall be published in the official Gazette, and shall thereupon have effect as if enacted in this Ordinance.

12. *Amendment of Child Marriage Restraint Act, 1929 (XIX of 1929)*.—In the Child Marriage Restraint Act, 1929 (XIX of 1929).—

(1) in section 2,—

(a) in clause (a), for the word “fourteen” the word “sixteen” shall be substituted;

(b) in clause (c), the word “and” shall be omitted; and

(c) in clause (d), for the full-stop at the end a comma shall be substituted, and thereafter the following new clause (e) shall be added, namely:—

“(e) ‘Union Council’ means the Union Council or the Town or Union Committee constituted under the Basic Democracies Order, 1959 (P. O. No. 18 of 1959), within whose jurisdiction a child marriage is or is about to be solemnized.”;

- (2) section 3, shall be omitted;
- (3) in section 4, for the words ‘twenty-one’ the word ‘eighteen’ shall be substituted;
- (4) in section 9, after the word “under this Act”, the words “except on a complaint made by the Union Council, or if there is no Union Council in the area, by such authority as the Provincial Government may in this behalf prescribe, and such cognizance shall in no case be taken” shall be inserted; and
- (5) section 11 shall be omitted.

13. *Amendment of the Dissolution of Muslim Marriages Act, 1939 (VIII of 1939).*—In the Dissolution of Muslim Marriages Act 1939 (VIII of 1939), in section 2,—

- (a) after clause (i), the following new clause (ia) shall be inserted, namely:—

“(ia) that the husband has taken an additional wife in contravention of the provisions of the Muslim Family Laws Ordinance, 1961;” and

- (b) in clause (vi), for the word “fifteen” the word “sixteen” shall be substituted.
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APPENDIX IV

WEST PAKISTAN RULES UNDER THE MUSLIM FAMILY LAWS ORDINANCE, 1961

[20th July 1961].

No. Integ : 4-5/61.— In exercise of the powers conferred by section 11 of the Muslim Family Laws Ordinance, 1961 (VIII of 1961), the Governor of West Pakistan is pleased to make the following rules, namely :—

Preliminary

1. These rules may be called the West Pakistan Rules under the Muslim Family Laws Ordinance, 1961.

2. In these rules, unless there is anything repugnant in the subject or context,—

- (a) “Form” means a form appended to these rules;
- (b) “Ordinance” means the Muslim Family Laws Ordinance, 1961 (VIII of 1961);
- (c) “Register” means a register of *nikahnama* prescribed under rule 8; and
- (d) “section” means a section of the Ordinance.

Arbitration Council

¹[3. The Union Council which shall have jurisdiction in the matter for purposes of clause (d) of section 2, shall be as follows, namely :—

- (a) in the case of an application for permission to contract another marriage under subsection (2) of section 6, it shall be the Union Council of the Union or Town in which the existing wife of the applicant, or where he has more wives than one, the wife with whom the applicant was married last, is residing at the time of his making the application :

¹Gazette Notification No. Integ. 10-34/64, dated 18-2-1965.

Provided that if at the time of making the application, such wife is not residing in any part of West Pakistan, the Union Council that shall have jurisdiction shall be—

(i) in case such wife was at any time residing with the applicant in any part of West Pakistan, the Union Council of the Union or Town where such wife so last resided with the applicant; and

(ii) in any other case, the Union Council of the Union or Town where the applicant is permanently residing in West Pakistan;

(b) in the case of a notice of *talaq* under subsection (1) of section 7, it shall be the Union Council of the Union or Town in which the wife in relation to whom *talaq* has been pronounced was residing at the time of the pronouncement of *talaq* :

Provided that if at the time of pronouncement of *talaq* such wife was not residing in any part of West Pakistan, the Union Council that shall have jurisdiction shall be—

(i) in case such wife was at any time residing with the person pronouncing the *talaq* in any part of West Pakistan, the Union Council of the Union or Town where such wife so last resided with such person; and

(ii) in any other case, the Union Council of the Union or Town where the person pronouncing the *talaq* is permanently resided in West Pakistan; and

(c) in the case of an application for maintenance under section 9, it shall be the Union Council of the Union or Town in which the wife is residing at the time of her making the application, and where application under that section is made by more than one wife, it shall be the Union Council of the Union or Town in which the wife who makes the application first is residing at the time of her making the application.]

¹[3-A. Where the whereabouts of the wife who is to be supplied a copy of the notice of *talaq* under sub-section (1) of section 7 of the Ordinance, are not known to the husband and cannot, with due diligence, be ascertained by him, he may, if so permitted by the Chairman, give notice of the *talaq* to the wife through her father, mother, adult brother or adult sister, or if their whereabouts are not known to the husband or cannot, with due diligence, be ascertained by him, he may, with the permission of the Chairman, serve the notice of *talaq* on her by publication in a newspaper, approved by the

¹Gazette Notification No. Integ. 10-34/64, dated 2-10-1965.

Chairman having circulation in the locality where he last resided with the wife.]

4. Where a non-Muslim has been elected as Chairman of a Union Council, the Council shall, as soon as may be, elect one of its Muslim members as Chairman for the purposes of the Ordinance, in the manner prescribed for the election of a Chairman of a Union Council.

5.—(1) All proceedings before an Arbitration Council shall be held *in camera*, unless the Chairman otherwise directs with the consent of all the parties.

(2) The Chairman shall conduct the proceedings of an Arbitration Council as expeditiously as possible.

(3) Subject to the provisions of sub-rule (4), such proceedings shall not be vitiated by reason of a vacancy in the Arbitration Council, whether on account of failure of any person to nominate a representative or otherwise.

(4) Where a vacancy arises otherwise than through failure to make a nomination, the Chairman shall require a fresh nomination.

(5) No party to proceedings before an Arbitration Council shall be a member of the Arbitration Council.

(6) All decisions of the Arbitration Council shall be taken by majority, and where no decision can be so taken, the decision of the Chairman shall be the decision of the Arbitration Council.

(7) A copy of the decision of the Arbitration Council, duly attested by the Chairman, shall be furnished free of cost to each of the parties to the proceedings.

6. (1) Within seven days of receiving an application under sub-section (2) of section 6 or under subsection (1) of section 9, or a notice under subsection (1) of section 7, the Chairman shall, by order in writing, call upon each of the parties to nominate his or her representative, and each such party shall, within seven days of receiving the order, nominate in writing a representative and deliver the nomination to the Chairman or send it to him by registered post.

(2) Where representative nominated by a party is, by reason of illness or otherwise, unable to attend the meetings of the Arbitration Council, or wilfully absents himself from such meeting, or has lost the confidence of the party, the party may, with the previous permission in writing of the Chairman, revoke the nomination and make, within such time as the Chairman, may allow, a fresh nomination :

¹["Provided that where a party on whom the order is to be served is residing outside Pakistan, the order may be served on such party through the Consular Officer of Pakistan in or for the country where such party is residing."]

(3) Where a fresh nomination is made under sub-rule (2), it shall not be necessary to commence the proceedings before the Arbitration Council *de novo*, unless the Chairman, for reasons to be recorded in writing, directs otherwise.

²[6-A. (1) Wherever, it is made to appear to the Collector, whether on the application of a party to the proceeding or on his own information, that the Chairman is interested in favour of a party to any proceedings before the Arbitration Council or is prejudiced against any such party, or that the Chairman is misconducting himself in any such proceedings, the Collector may, after giving notice to all the parties to the proceedings, appoint any other member of the Union Council as the Chairman for purposes of this Ordinance, and pending the passing of such order may stay the proceedings before the Arbitration Council.

(2) A Collector passing an order under this rule shall record in writing his reasons for the same.]

Registration of Marriages

7.—(1) Any person competent to solemnize a marriage under Muslim Law may apply to the Union Council for the grant of a licence to act as Nikah Registrar under section 5.

(2) If the Union Council, after making such enquiries as it may consider necessary, is satisfied that the applicant is a fit and proper person for the grant of a licence, it may, subject to the conditions specified therein, grant a licence to him in Form I.

(3) A licence granted under this rule shall be permanent and shall be revocable only for the contravention of any of the conditions of a licence granted under this rule.

(4) If any person to whom a licence has been granted under this rule contravenes any of the conditions of such licence, he shall be punishable with simple imprisonment for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both.

¹Gazette Notification No. Integ. 10-34/64, dated 18-2-1965.

²Ins. by W. P. Gazette Notification No. Integ. 4-5/61, dated 2-9-1961.

8.—(1) The Union Council shall, on payment of such cost as may be determined by the Provincial Government, supply to every Nikah Registrar a bound register of *nikahnama* in Form II, and a seal bearing the inscription “The seal of the Nikah Registrar of Ward *(x) (y)”

(2) Each register shall contain fifty leaves, consecutively numbered, each leaf having a *nikahnama*, in quadruplicate, and the number of leaves shall be certified by the Chairman.

(3) Notwithstanding the payment of cost under sub-rule (1), the register and the seal shall remain the property of the Union Council.

9.—(1) For the registration of a marriage registered under section 5, the Nikah Registrar shall be paid by the bridegroom or his representative a registration fee of two rupees, or when the dower exceeds two thousand rupees, a fee calculated at the rate of one rupee for every thousand or part of thousand rupees of such dower, subject to a maximum fee of twenty rupees.

(2) Of the fees received under sub-rule (1), the Nikah Registrar shall retain for himself eighty per cent. and shall pay the remaining twenty per cent. to the Union Council.

(3) Where dower consists of property other than money, or partly of such property and partly of money, the valuation of the property shall, for purposes of fees under sub-rule (1), be the valuation as settled between the parties to the marriage.

10.—(1) The Nikah Registrar shall, in the case of a marriage solemnized by him, fill in Form II, in quadruplicate, in the register, the persons, whose signatures are required in the Form, shall then sign, and the Nikah Registrar shall then affix his signature and seal thereto, and keep the original intact in the register.

(2) The duplicate and triplicate of the *nikahnama* filled in as aforesaid, shall be supplied to the bride and the bridegroom, respectively, on payment of fifty paise each, and the quadruplicate shall be forwarded to the Union Council.

(3) If any person required by this rule to sign the register refuses so to sign, he shall be punishable with simple imprisonment for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both.

*For (x) insert the name or number of the Ward, and for (y) insert name of the Union Council.

11.—(1) Where a marriage is solemnized in Pakistan by a person other than the Nikah Registrar, such persons shall fill in Form II, to be had loose on payment of such price as may be determined by the Provincial Government, the persons whose signature are required in the Form shall then sign, and the person solemnizing the marriage shall then affix his signature to the Form and ensure delivery, as expeditiously as possible, of the same together with the registration fee to the Nikah Registrar of the Ward where the marriage is solemnized.

(2) If any person required by this rule to sign the Form refuses so to sign, he shall be punishable with simple imprisonment for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both.

12.—(1) In the case of a marriage solemnized outside Pakistan, by a person who is a citizen of Pakistan, such person shall ensure delivery of Form II, filled in, in accordance with the provisions of rule 11; together with the registration fee, to the consular officer of Pakistan in or for the country in which the marriage is solemnized, for onward transmission to the Nikah Registrar of the Ward of which the bride is a permanent resident, and in case the bride is not a citizen of Pakistan, the Nikah Registrar of the Ward of which the bridegroom is such resident.

(2) In the case of a marriage solemnized outside Pakistan by a person who is not a citizen of Pakistan, the bridegroom, and where only the bride is such citizen, the bride, shall for purposes of filling in, as far as may be, Form II, be deemed to be the person who has solemnized the marriage under sub-rule (1).

13. On receipt of Form II under rule 11 or rule 12, the Nikah Registrar shall proceed in the manner provided in rule 10 as if the marriage had been solemnized by him :

Provided that, except where the marriage has been solemnized within his jurisdiction, it shall not be necessary for the Nikah Registrar to obtain the signatures of the necessary persons.

Polygamy

14. In considering whether another proposed marriage is just and necessary during the continuance of an existing marriage the Arbitration Council may, without prejudice to its general powers to consider what is just and necessary, have regard to such circumstances, as the following amongst others :—

Sterility, physical infirmity, physical unfitness for the conjugal relation, wilful avoidance of a decree for restitution of conjugal rights, or insanity on the part of an existing wife.

15. An application under subsection (1) of section 6 for permission to contract another marriage during the subsistence of an existing marriage shall be in writing, shall state whether the consent of the existing wife or wives has been obtained thereto, shall contain a brief statement of the ground on which the new marriage is alleged to be just and necessary, shall bear the signature of the applicant, and shall be accompanied by a fee of one hundred rupees.

Revision

16. (1) An application for the revision of a decision of an Arbitration Council, under subsection (4) of section 6, or of a certificate under subsection (2) of section 9, shall be preferred within thirty days of the decision or of the issue of the certificate, as the case may be, and shall be accompanied by a fee of two rupees.

(2) The application shall be in writing, set out the grounds on which the applicant seeks to have the decision or the certificate revised, and shall bear the signature of the applicant.

Records and their Inspection, etc.

17. As soon as may be after the Arbitration Council has given its decision under rule 6, the record of the proceedings before it in which such decision has been given shall be forwarded by the Chairman to the office of the Union Council, where it shall be preserved for a period of five years from the date of the decision.

18. (1) The quadruplicate of the *nikahnama* forwarded by Nikah Registrar under sub-rule (2) of rule 10 shall be preserved in the office of the Union Council until such time as the register containing the originals is, on being completed, deposited by the Nikah Registrar in such office.

(2) The completed register so received shall be preserved permanently.

(3) In the office of the Union Council there shall be prepared and maintained an index of the contents of every register, and every entry in such index shall be made, so far as practicable, immediately after the Nikah Registrar has made an entry in the register.

(4) The aforesaid index shall contain the name, place of residence and father's name of each party to every marriage registered within the Union or Town, as the case may be, and the dates of the marriage and registration.

19.—(1) Subject to the previous payment of the fees prescribed in sub-rules (2) and (3), the index and the register shall, at all reasonable times, be open to inspection at the office of the Union Council by any person applying to inspect the same and copies of entries in the index and the register, duly signed and sealed by the Chairman, shall be given to all persons applying for such copies.

(2) The fee for the inspection of an index or register shall be fifty paisa.

(3) The fee for a certified copy of all or any of the entries relating to a marriage shall be—

(a) for those in an index ... Fifty paisa.

(b) for those in a register ... Two rupees.

(4) Fees payable under this rule shall be credited to the Union Council.

Payment of Fees

20. Except fees payable to the Nikah Registrar, ¹[or the Union Council under the provisions of Rule 9, ²[10, 15 and 19] which shall be paid in cash, all fees payable under these rules shall be paid in non-judicial stamps.

Complaints

21. No Court shall take cognizance of any offence under the Ordinance or these rules save on a complaint in writing by the Union Council, stating the facts constituting the offence.

Form I

(See Rule 7)

Licence granted in pursuance of section 5 (2) of the Muslim Family Laws Ordinance (VIII of 1961)

In pursuance of subsection (2) of section 5 of the Muslim Family Laws Ordinance, 1961 (VIII of 1961), the *Union Council/Union Committee/Town Committee of.....in the district of.....hereby grant this.....day of.....19.....to Mr.....son of.....resident of.....this licence, subject to the conditions hereunder specified, to be from the said date the Nikah Registrar for the following *Ward/Wards :—

- (1) Ward
- (2) Ward.....
- (3) Ward.....
- (4) Ward.....

Seal

Signature of the Chairman.

¹Inserted by Gazette Notification No. Integ. 4-5/61, dated 2-9-1961.

²Inserted by Gazette Notification No. Integ. 4-5/61, dated 15-2-1962.

*Strike out what is inapplicable.

CONDITIONS

1. This licence is not transferable.
2. This licence is revocable for breach of any of the provisions of the Muslim Family Laws Ordinance, 1961 (VIII of 1961), or the rules made thereunder or of any condition of this licence.
3. The registers and seal supplied to the Nikah Registrar shall be returnable to the *Union Council/Union Committee/Town Committee without refund of cost, when this licence expires or is revoked.
4. The Nikah Registrar shall not put the seal supplied to him to any improper use.
5. Such other conditions, if any, as may be specified by the Provincial Government.

Form II

(See Rules, 8, 10, 11 and 12)

*Form of Nikahnama as prescribed by rule 8 of the W. Pakistan
Muslim Family Laws Rules, 1961*

- (1) Name of the Ward.....Town/Union.....Tehsil/
Thana.....and District.....in which the marriage
took place.
- (2) Name of the bridegroom and his father, with their respective
residences :
.....
- (3) Age of the bridegroom.....
- (4) The names of the bride and her father, with their respective
residences :
.....
- (5) Whether the bride is a maiden, a widow or a divorcee.....
.....
- (6) Age of the bride.....
- (7) Name of Vakil, if any, appointed by the bride, his father's name
and his residence :
.....
- (8) The names of the witnesses to the appointment of the bride's
Vakil with their father's names, their residences and their relationship
with the bride :
 - (1)
 - (2)

*Strike out what is inapplicable.

(9) Name of Vakil, if any, appointed by the bridegroom, his father's name and his residence :

.....

(10) The names of the witnesses to the appointment of the bridegroom's Vakil, with their father's name and their residences :

(1)

(2)

(11) Names of the witnesses to the marriage, their fathers' names and their residences :

(1)

(2)

(12) Date on which the marriage was contracted.....

(13) Amount of dower :

(14) How much of the dower is *mu'ajjal* (prompt) and how much *muwajjal* (deferred).....

(15) Whether any portion of the dower was paid at the time of marriage, if so, how much :

.....

(16) Whether any property was given in lieu of the whole or any portion of the dower with specification of the same and its valuation agreed to between the parties :

.....

(17) Special conditions, if any :

.....

(18) Whether the husband has delegated the power of divorce to the wife. If so, under what conditions :

.....

(19) Whether the husband's right of divorce is in any way curtailed :

.....

(20) Whether any document was drawn up at the time of marriage relating to dower, maintenance, etc. If so, contents thereof in brief :

.....

(21) Whether the bridegroom has any existing wife, and, if so, whether he has secured the permission of the Arbitration Council under the Muslim Family Laws Ordinance, 1961, to contract another marriage :

.....

(22) Number and date of the communication conveying to the bridegroom the permission of the Arbitration Council to contract another marriage :

(23) Name and address of the person by whom the marriage was solemnized and his father.

(24) Date of registration of marriage

(25) Registration fee paid :

*Signature of the bridegroom or
Vakil :*

*Signature of the witness to be
appointed of bridegroom's
Vakil :*

Signature of the bride :

*Signature of the Vakil
of the bride :*

*Signature of the
witness to be
appointed of the
bride's Vakil :*

*Signatures of the witnesses to
the marriage :*

*Signature of the person who
solemnized the marriage :*

(1)

(2)

*Signature and seal of the Nikah
Registrar :*

Seal

APPENDIX V

**THE
WEST PAKISTAN MUSLIM PERSONAL LAW
(SHARI'AT) APPLICATION ACT, 1962**

West Pakistan Act V of 1962¹

[31st December 1962]

An Act to consolidate and amend the provisions for the application of Muslim Personal Law (Shari'at) in the Province of West Pakistan.

Preamble.—Whereas it is expedient to consolidate and amend the provisions for the application of Muslim Personal Law (Shari'at) in the Province of West Pakistan;

It is hereby enacted as follows:—

1. *Short title and extent.*—(1) This Act may be called the West Pakistan Muslim Personal Law (Shari'at) Application Act, 1962.

(2) It extends to the whole of the Province of West Pakistan except the Tribal Areas.

2. *Application of the Muslim Personal Law.*—Notwithstanding any custom or usage, in all questions regarding succession (whether testate or intestate), special property of females, betrothal, marriage, divorce, dower, adoption, guardianship, minority, legitimacy or bastardy, family relations, wills, legacies, gifts, religious usages or institutions including *waqfs*, trusts and trusts properties, the rule of decision, subject to the provisions of any enactment for the time being in force, shall be the Muslim Personal Law (Shari'at) in cases where the parties are Muslims.

¹[3. *Termination of limited estates under Customary Law.*—The limited estates in respect of immovable property held by Muslim females under the Customary Law are hereby terminated :

Provided that nothing herein contained shall apply to any such estate saved by any enactment, repealed by this Act, and the estates so excepted

¹For Statement of Objects and Reasons, see Gazette of West Pakistan 1962, Extraordinary, pp. 4275-4276.

¹Subs. by the West Pakistan Ordinance No. XXXIX of 1963, s. 2, which should be deemed always to have been so substituted.

shall continue to be governed by that enactment, notwithstanding its repeal by this Act.]

4. *Further operation of certain wills shall cease on the death of legatee-in-enjoyment.*—Where a will providing for more than one legatee succeeding to the testator's property one after the other is operative at the commencement of this Act, its further operation shall cease upon the death of the legatee-in-enjoyment.

5. *Devolution of property on the termination of life estate and certain wills.*—The life estate terminated under section 3 or the property in respect of which the further operation of a will has ceased under section 4 shall devolve upon such persons as would have been entitled to succeed under the Muslim Personal Law (Shari'at) upon the death of the last full owner or the testator as though he had died intestate; and if any such heir has died in the meantime, his share shall devolve in accordance with Shari'at on such persons as would have succeeded him, if he had died immediately after the termination of the life estate or the death of the said legatee :

Provided that the share to which a Muslim female holding limited estate under Customary Law would have been entitled under the Muslim Personal Law (Shari'at) upon the death of the last full owner shall devolve on her.

6. *Sections 3, 4 and 5 only to be retrospective.*—Save as expressly provided by the provisions of sections 3, 4 and 5, this Act shall have no retrospective operation.

7. *Repeal and savings.*—(1) The following enactments are hereby repealed :—

- (a) The Punjab Limitation (Custom) Act, 1920;
- (b) The Punjab Custom (Power to Contest) Act, 1920;
- (c) The Muslim Personal Law (Shari'at) Application Act, 1937, in its application to West Pakistan;
- (d) The North-West Frontier Province Muslim Personal Law (Shariat) Application Act, 1935;
- (e) The Punjab Muslim Personal Law (Shariat) Application Act, 1948;
- (f) The Muslim Personal Law (Shari'at) Application (Sind Amendment) Act, 1950;
- (g) The Bahawalpur State Shariat (Muslim Personal Law) Application Act, 1951;
- (h) The Khairpur State Muslim Female Inheritance (Removal of Customs) Act, 1952;

¹[(2) * * * *]

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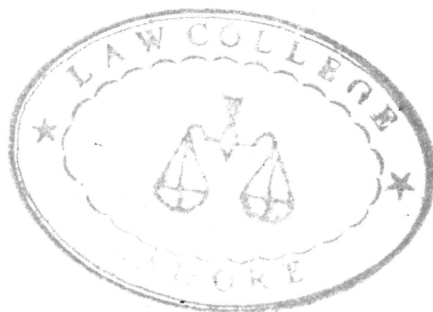
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